TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 75.

THE HANNIS DISTILLING COMPANY, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED FEBRUARY 15, 1908.

(21,020.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 14, 1909.

1 *Transcript of Record.*

UNITED STATES OF AMERICA,
District of Maryland, To wit:

At a Circuit Court of the United States, for the District of Maryland, begun and held at the Court-house, in the City of Baltimore, on the first Monday of November, being the fourth day of the same month, in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable Thomas J. Morris, Judge of the Maryland District; John C. Rose, Esq., Attorney; John F. Laughammer, Esq., Marshal; Arthur L. Spanner, Clerk.

Among other were the following proceedings, to wit:

At Law.

MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff,
versus
THE HANNIS DISTILLING COMPANY, a Corporation, Defendant.

A transcript of the record and proceedings of the Court of Common Pleas of Baltimore City, in the above entitled case, was filed in the Circuit Court here, on the 15th day of August, 1904, which said record is in the words and figures following, to wit:

2 *Transcript of Record from Court of Common Pleas of Baltimore City.*

Filed 15th August, 1904.

STATE OF MARYLAND,
City of Baltimore, set:

At a session of the Court of Common Pleas in the Eighth Judicial Circuit of the State of Maryland, begun and held at the Court House in said City on the Second Monday of May, being the ninth day of said month, in the year of our Lord one thousand nine hundred and four.

Present: The Honorable Henry Stockbridge, Associate Judge of the Supreme Bench of Baltimore City, assigned to and presiding over the Court of Common Pleas, and William H. Green, Sheriff, and Adam Deupert, Clerk.

Among other, were the following proceedings, to wit:

MAYOR AND CITY COUNCIL OF BALTIMORE, a Corporation Duly Incorporated, Plaintiff,
vs.
HANNIS DISTILLING COMPANY, a Corporation Duly Incorporated.

Be it remembered, on the 6th day of July, 1904, The Mayor and City Council of Baltimore City, Maryland, by W. Cabell Bruce, its

Solicitor, filed in the Court of Common Pleas of Baltimore City, Maryland, the following Declaration:

3 In the Court of Common Pleas.

MAYOR AND CITY COUNCIL OF BALTIMORE, a Corporation Duly Incorporated,

vs.

HANNIS DISTILLING COMPANY, a Corporation Duly Incorporated, Defendant.

The Mayor and City Council of Baltimore, a body corporate, Plaintiff, by W. Cabell Bruce, its attorney, sues the Hannis Distilling Company, a corporation duly incorporated, Defendant, for money payable by the Defendant to the Plaintiff;

First. For that heretofore, to wit, on and after the first day of January, 1902, there was in the ownership and possession or custody, of said Defendant in the City of Baltimore, State of Maryland, 50,996 barrels of distilled spirits, upon which there was duly made by the State Tax Commissioner of Maryland, an assessment of $8.00 per barrel, amounting in the aggregate to $407,968, for purposes of State and City taxation, for the year 1902; upon which said assessment as aforesaid there was lawfully levied by the Mayor and City Council of Baltimore, by Ordinance No. 13, approved December 9, 1901, a tax of $1.95 per $100 for City purposes, for the year 1902, said tax upon said total assessment, including interest and penalties to the date of the institution of this suit, amounting to $9,259.28, which said amount is now due and payable by said Defendant to the Plaintiff, and the Defendant, though often requested so to do, has failed and refused to pay said tax, or any part thereof, and still fails and refuses so to do.

Second. For that heretofore, to wit, on and after the first day of January, 1903, there was in the ownership and possession,
4 or custody, of said Defendant, in the City of Baltimore, State of Maryland, 54,414 barrels of distilled spirits, upon which there was duly made by the State Tax Commissioner of Maryland, an assessment of $8.00 per barrel, amounting in the aggregate to $435,312, for purposes of State and City taxation, for the year 1903; upon which said assessment as aforesaid there was lawfully levied by the Mayor and City Council of Baltimore, by Ordinance No. 109, approved December 23, 1902, a tax of $1.86¾ per $100 for City purposes, for the year 1903, said tax upon said total assessment, including interest and penalties to the date of the institution of this suit, amounting to $8,959.49, which said amount is now due and payable by said Defendant to the Plaintiff, and the Defendant, though often requested so to do, has failed and refused to pay said tax, or any part thereof, and still fails and refuses so to do.

And the Plaintiff claims $25,000 damages.

W. CABELL BRUCE.
Attorney for Plaintiff.

To the Defendant:

Take Notice: That on the day of your appearance to this action in the Court of Common Pleas, you will be required to plead to said declaration in accordance with the Act of 1886, Chapter 184, or judgment by default will be entered against you.

W. CABELL BRUCE,
Attorney for Plaintiff.

5 In the Court of Common Pleas.

MAYOR AND CITY COUNCIL OF BALTIMORE, a Corporation Duly Incorporated, Plaintiff,

vs.

HANNIS DISTILLING COMPANY, a Corporation Duly Incorporated, Defendant.

STATE OF MARYLAND,
City of Baltimore, To wit:

I hereby certify, that on this First day of July, 1904, before the subscriber, a Justice of the Peace of the State of Maryland, in and for the City of Baltimore, personally appeared Henry Williams, City Collector, a municipal official of the Mayor and City Council of Baltimore, Plaintiff, in the above entitled case, and made oath in due form of law, on behalf of said corporation, that there is justly due and owing to said corporation by the said Hannis Distilling Company, the Defendant in said case, the full and just sum of $18,218.77, over and above all discounts, upon the two personal tax bills, for the years 1902 and 1903, the causes of action in the said case, which are produced before me, and are hereto annexed; and the said Henry Williams further made oath that he is the City Collector and agent in this behalf of the said Mayor and City Council of Baltimore, and duly authorized to make this affidavit, and that he has personal knowledge of the matters therein stated.

WILMER EMORY,
Justice of the Peace.

6 E. A. Hartman, Deputy Collector. Personal. C. T. Jenkins, Cashier. J. L. Cassard, Assistant Cashier.

Examine bills before paying and see that no property is omitted.

Hannis Distilling Co. City Hall—Office Hours: 9 A. M. to 3 P. M.; Saturdays, 12 noon.

State Taxes, 1903.

Henry Williams, Collector, to the State of Maryland, Dr.

Ledger.	Folio.			State tax.	
3	365	To Amount of Assessment as per Annexed City Bill.	435,312	At 17 cts. per $100	740 04
				Interest	22 21
				Commission, one per cent	7 41
					769 66
				Penalty	23 09
				State total	792 75

(Interest will be charged on State Bill from January 1st, 1904.)

City Taxes, 1903.

Henry Williams, Collector, to the Mayor and City Council of Baltimore, Dr.

Ward.	Folio.			City tax.	
18	570	54,414 bbls. Dist. Spirits at 8.00.....	435312	At $1.86⅞ per $100.....	8,129 46
				Interest	569 07
					8,698 53
				Penalty.	260 96
				City total	8,959 49
				Received Payment for the Collector for State and City Taxes.	9,752 24

(Interest will be charged on City Bill from May 1st, 1903.)

Bills Payable only at Tax Department, and Receipts of Collector, Deputy Collector and Cashiers alone are valid.

This Bill in arrears May 1st, 1903, and if not paid within 30 days thereafter, a penalty of three per cent. of the gross amount will be added thereto and payment enforced according to law. (Over)

City Levy, 1903.

Direct Tax	44 11–16	cts. per 100	Public Improvement 1940 loan Sinking Fund	02	cts. per 100
Public Schools.....	40 13–16	cts. per 100	Four Million 1945 loan Sinking Fund.	00½	cts. per 100
Police Department.....	32⅛	cts. per 100	Funding 1936 loan Sink. F'd.....	01	cts. per 100
City Poor.....	16 11–16	cts. per 100	Conduit 1922 loan Sink. F'd.....	01	cts. per 100
Courts	06¼	cts. per 100	Refund'g 1940 loan Sink. F'd.....	02	cts. per 100
Interest on Stock Debt.....	29 7–16	cts. per 100	Conduit 1928 loan Sink. F'd.....	01	cts. per 100
Opening Streets.....	00½	cts. per 100	Internal Improvement 1928 loan Sinking Fund	03	cts. per 100
General Sinking Fund.....	02¼	cts. per 100			
Water 1916 loan Sinking F'd.....	02	cts. per 100			
Water 1922 loan Sinking F'd.....	00½	cts. per 100			
Water 1926 loan Sinking F'd.....	01	cts. per 100		$1.86⅞	

7 E. A. Hartman, Deputy Collector. 6. Personal. C. T. Jenkins, Cashier. J. L. Cassard, Assistant Cashier.

Examine bills before paying and see that no property is omitted.

Hannis Distilling Co. City Hall—Office Hours, 9 A. M. to 3 P. M.; Saturdays, 12 noon.

State Taxes, 1902.

Henry Williams, Collector, to the State of Maryland, Dr.

Ledger.	Folio.			State Tax.	
15	178	To amount of Assessment as per Annexed City Bill.	407,968	At 17 cts. per $100.....	693 55
				Interest.....	62 42
				Commission, one per cent.....	6 94
					762 91
				Penalty.....	22 89
				State total.....	785 80

(Interest will be charged on State Bill from January 1st, 1903.)

City Taxes, 1902.

Henry Williams, Collector, to the Mayor and City Council of Baltimore, Dr.

Ward.	Folio.			City Tax.	
18	930	50,996 bbls. Distilled Spirits at 8.00..	407,968	At $1.95 per $100.....	7,955 38
				Interest.....	1,034 20
					8,989 58
				Penalty.....	269 70
				City total.....	9,259 28
				Received Payment for the Collector for State and City Taxes	10,045 08

(Interest will be charged on City Bill from May 1st, 1902.)

Bills Payable only at Tax Department, and Receipts of Collector, Deputy Collector and Cashiers alone are valid.

This Bill in arrears May 1st, 1902, and if not paid within 30 days thereafter, a penalty of three per cent. of the gross amount will be added thereto and payment enforced according to law. (Over)

City Levy, 1902.

Direct Tax.....	55½	cts. per 100	Internal Improvement 1928 Loan Sinking Fund...	03	cts. per 100
Public Schools.....	41⅝	cts. per 100	Public Improvement 1940 Loan Sinking Fund.....	02	cts. per 100
Police Department.....	31 9–16	cts. per 100	Four Million 1945 Loan Sinking Fund.	00½	cts. per 100
City Poor.....	14½	cts. per 100	Funding 1936 Loan Sink. F'd.	01	cts. per 100
Courts, &c.....	06⅝	cts. per 100	Conduit 1922 Loan Sink. F'd.	01	cts. per 100
Interest on Stock Debt.....	29 13–16	cts. per 100	Refund'g 1940 Loan Sink. F'd.....	02	cts. per 100
General Sinking Fund.....	03¼	cts. per 100			
Water 1916 Loan Sinking F'd....	02	cts. per 100		$1.95	
Water 1922 Loan Sinking F'd....	00½	cts. per 100			
Water 1926 Loan Sinking F'd....	01	cts. per 100			

8 And on the back thereof appears:

In the Court of Common Pleas.

MAYOR AND CITY COUNCIL OF BALTIMORE, a Corporation Duly Incorporated, Plaintiff,

vs.

HANNIS DISTILLING COMPANY, a Corporation Duly Incorporated, Defendant.

Declaration.

Mr. CLERK: Issue in this case, and send copy of the declaration and notice with the writ, to be served on the defendant, and make the writ returnable, on the second Monday of July, 1904.

W. CABELL BRUCE,
Attorney for Plaintiff.

Fd. 6 July, 1904.

Thereupon and in compliance with said Declaration, the writ, of the State of Maryland, of Summons was issued to the Sheriff of Baltimore City, and the same made returnable on the Second Monday of July, 1904.

9 (*Writ of Summons.*)

STATE OF MARYLAND,
Baltimore City, To wit:

[SEAL.]

To the Sheriff of Baltimore City, Greeting:

You are hereby commanded to summon Hannis Distilling Company, a corporation duly incorporated, of Baltimore City, to appear before the Court of Common Pleas, to be held at the Court House in the same City, on the second Monday of July inst., to answer an action at the suit of Mayor and City Council of Baltimore, a corporation duly incorporated, and have you then and there this writ:

Witness, the Honorable Henry D. Harlan, Chief Judge of the Supreme Bench of Baltimore City, the 9 day of May, 1904.

Issued 6 day of July, 1904.

ADAM DEUPERT, *Clerk.*

And on the back thereof appears: No. 31. To July R. D. Term 1904. Mayor & City Council of Baltimore, a corporation, &c., *vs.* Hannis Distilling Company, a corporation, &c. Writ of summons. Action, copy of Nar, and notice to plead to be served on Defendant. W. Cabell Bruce, Attorney. Filed 11 day of July, 1904.

10 And now here at the said Second Monday of July, in the year last aforesaid, the same being the return day of the afore-

going writ, comes into this Court here the said Plaintiff, by its attorney aforesaid, and the Sheriff aforesaid, to wit, William H. Green: Gentlemen:—to whom the said writ was in form aforesaid directed and the said Sheriff makes return thereof to the Court thus endorsed. *Non est.*

WILLIAM H. GREEN, *Sheriff.*

(JORDING.)

And on the 12th day of July, 1904, being after the July Rule Day and the Defendant not having been summoned by the Sheriff of Baltimore City, the above writ was reissued and made returnable on the 2nd Monday of August, 1904, being the 8th day of the said month, as follows:

(*Writ of Summons.*)

STATE OF MARYLAND,
Baltimore City, To wit:

[SEAL.]

To the Sheriff of Baltimore City, Greeting:

You are hereby commanded to summon Hannis Distilling Company, a corporation duly incorporated, of Baltimore City, to appear before the Court of Common Pleas, to be held at the Court House in the same City, on the second Monday of August next, to answer an action at the suit of Mayor and City Council of Baltimore, a corporation, duly incorporated, and have you then and there this writ.

Witness, the Honorable Henry D. Harlan, Chief Judge of the Supreme Bench of Baltimore City, the 9 day of May 1904.

11 Issued 12 day of July, 1904.

ADAM DEUPERT, *Clerk.*

And on the back thereof appears: No. 9. To Aug. R. D.—Term 1904. Mayor & City Council of Balto. a corporation, &c., *vs.* Hannis Distilling Company, a corporation, duly incorporated. Writ of summons. 2nd Renewal. Action, copy of Nar. and notice to plead to be served on Defendant. W. Cabell Bruce, Attorney. Filed 8 day of Aug. 1904.

And thereupon the said defendants were summoned as follows:

Summoned the Hannis Distilling Company, a Corporation duly incorporated by service on Horace W. White, Assistant Secretary and General Superintendent and a Copy of Nar and Notice to plead and a Copy of the Process left with the defendant.

WILLIAM H. GREEN, *Sheriff.*

(JORDING.)

12 And thereupon on Motion of the said Plaintiff, by its attorney aforesaid, it is ruled by the Court here that the said Defendant aforesaid answer the declaration of the Plaintiff within the time prescribed by law or judgment will be entered against it in default thereof.

And thereafter on the 10 day of August, 1904, the Defendant by its attorney filed a petition and affidavit for removal of this cause to the Circuit Court of the United States for the District of Maryland, as follows:

In the Court of Common Pleas of Baltimore City.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, a Body Corporate,

vs.

THE HANNIS DISTILLING COMPANY, a Body Corporate.

To the Honorable the Judge of said Court:

The Petition of The Hannis Distilling Company, a corporation created and existing as such under the laws of the State of West Virginia, respectfully shows unto your Honor:

1. That the Mayor and City Council of Baltimore, a corporation duly incorporated, plaintiff in the above entitled case, is now, and was at the time of the institution of this suit, a resident and a citizen of the State of Maryland.

2. That your petitioner is a corporation duly incorporated under the laws of the State of West Virginia, and at the time of the institution of this suit, was, and is now, in the meaning of the Acts of Congress of the United States, which provide for the removal of suits from courts of a state to Circuit Courts of the United States, a citizen and resident of the State of West Virginia, and at the
13 time of the institution of this suit was not, and is not now, a citizen or resident of the State of Maryland.

3. That the matter in dispute in said suit exceeds the sum of two thousand dollars, exclusive of costs and interest; that the said suit is of a civil nature, being a suit for the recovery of taxes alleged to be due to the plaintiff from the defendant on whiskey in its possession.

4. That the controversy in said suit is wholly between your petitioner, The Hannis Distilling Company, the defendant, and The Mayor and City Council of Baltimore, the plaintiff, and one which can be fully determined between them;

Wherefore your petitioner prays this Honorable Court that said suit be removed into the Circuit Court of the United States for the District of Maryland, and that this Honorable Court shall proceed no further except to pass an order for the removal of the said suit to the said Circuit Court of the United States, after your petitioner shall have filed therein, and this Court shall have approved, a bond, which is hereby tendered, with good and sufficient surety, conditioned that your petitioner will file, or cause to be filed, in the said Circuit Court of the United States, at its next session, a copy of the record of said suit, and shall pay all costs that shall be awarded by said Circuit Court of the United States, if said Circuit Court of the

United States shall hold that said suit was improperly or wrongfully removed thereto.

And as in duty bound, &c.,

THE HANNIS DISTILLING COMPANY,
By H. J. M. CARDEZA,
Vice-President. [SEAL.]

BERNARD CARTER & SONS,
Attorneys for Petitioner.

14 STATE OF NEW YORK,
City and County of New York, ss:

I hereby certify, that on this fifth day of August, in the year nineteen hundred and four, before me, the subscriber, a Notary Public of the State of New York, being and residing in the City of New York, and County of New York aforesaid, duly commissioned and qualified, personally appeared H. J. M. Cardeza, Vice-President of The Hannis Distilling Company, and made oath in due form of law that he has read the aforegoing Petition, and knows the contents thereof, and that the statements and allegations therein contained are true to the best of his knowledge and belief.

In witness whereof I have hereunto set my hand and Notarial Seal the day and date last above written.

[SEAL.] JAMES P. McGOVERN,
Notary Public, New York County.

And with the said Petition and Affidavit, a bond was filed, as follows:

Know all men by these presents:

That, The National Surety Company, a corporation duly incorporated under the laws of the State of New York, and duly authorized to carry on its business in the State of Maryland, is held and firmly bound unto the Mayor and City Council of Baltimore, in the full and just sum of Two hundred Dollars, to be paid to the said Mayor and City Council of Baltimore, to the payment whereof, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents, sealed with its seal and dated this 9th day
15 of August in the year nineteen hundred and four.

Whereas, The Hannis Distilling Company, a body corporate, duly created under the Laws of the State of West Virginia, has filed its petition in the Court of Common Pleas of Baltimore City, in a certain case therein pending wherein the said Mayor and City Council of Baltimore is plaintiff, and the said Hannis Distilling Company is defendant, asking for the passage of an order by the said Court for the removal of the said case from the said Court to the Circuit Court of the United States in and for the District of Maryland, upon the filing in the said case in said Court of Common Pleas of an approved bond, conditioned that the said petitioner will file, or cause to be filed in the said Circuit Court of the United States, at its next session, a copy of the record of said suit, and will pay all costs that shall be awarded by the said Circuit Court of the

United States if said Circuit Court shall hold that said suit was improperly or wrongfully removed thereto:

Now the condition of the above obligation is such:

That if the said Hannis Distilling Company shall file, or cause to be filed, in the Circuit Court of the United States, in and for the District of Maryland, at its next session a copy of the record of the said case of The Mayor and City Council of Baltimore *vs.* The Hannis Distilling Company, now pending in the Court of Common Pleas of Baltimore City, and will pay all costs which shall be awarded by the said Circuit Court of the United States if that Court shall hold that said case was improperly or wrongfully removed thereto, then the above obligation to be void; otherwise, to be and remain in full force and virtue in law.

Witness the corporate name of The National Surety Company subscribed by its resident Vice-President and the corporate
16 seal affixed hereto, duly attested by its resident Assistant Secretary.

[SEAL.] NATIONAL SURETY COMPANY,
By SHIRLEY CARTER,
Resident Vice President.
JULIAN S. CARTER,
Resident Assistant Secretary.

And on the same day as aforesaid, the said petition and affidavit being read and heard, and the said bond approved, the Court passed the following order:

In the Court of Common Pleas of Baltimore City.

MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
THE HANNIS DISTILLING COMPANY.

Upon the foregoing petition and affidavit, it is this 10th day of August, in the year nineteen hundred and four, ordered by the Court of Common Pleas of Baltimore City, that the above entitled case be removed to the Circuit Court of the United States for the District of Maryland, upon the filing by the petitioner in this Court the bond, hereto annexed, made by the National Surety Company, to the Mayor and City Council of Baltimore, in the penalty of two hundred dollars, and dated the 9th day of August in the year nineteen hundred and four, and which bond is hereby approved and accepted.

HENRY D. HARLAN,
Judge of the Court of Common Pleas of Baltimore City.

Which is accordingly transmitted.

Test:

ADAM DEUPERT, *Clerk.*

17 Plaintiffs' Costs $8.25
Defendant's Costs $6.30

$14.55

Paid by Defendant.

STATE OF MARYLAND,
Baltimore City, set:

I, Adam Deupert, Clerk of the Court of Common Pleas in the Eighth Judicial Circuit of the State of Maryland, do hereby certify, that the aforegoing is a full, true and entire transcript of the record of proceedings of said Court in the therein mentioned cause.

In testimony whereof, I hereto set my hand and affix the Seal of said Court, this 15th day of August, 1904.

[SEAL.] ADAM DEUPERT,
Clerk, Court of Common Pleas.

18 *Petition of Defendant for Leave to Amend Pleadings and Order of Court Thereon Granting Leave as Prayed.*

Filed 13th June, 1907.

In the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE, a Corporation Duly Incorporated, Plaintiff,
vs.
HANNIS DISTILLING COMPANY, a Corporation Duly Incorporated, Defendant.

To the Honorable Thomas J. Morris, Judge of said Court:

The Petition of the Hannis Distilling Company, the Defendant in the above entitled case, respectfully shows unto your Honor:

1. That the above case was originally instituted in the Court of Common Pleas of Baltimore City, in the month of July, in the year 1904.

2. That thereafter, in the month of August 1904, the said case was removed to this Court at the instance of the Defendant on the ground of diversity of citizenship of the parties.

3. That thereafter, the Defendant duly filed two Pleas to the Declaration filed in said case, and issue was joined thereon by the Plaintiff.

4. That the Defendant wishes now to amend its pleadings in this case by filing two additional Pleas to the Declaration in this case, and prays the Court to pass an Order granting the Defendant

19 leave so to do.

And as in duty bound, etc.,

BERNARD CARTER & SONS,
Att'ys for Defendant.

Ordered by the Circuit Court of the United States, for the District of Maryland, this 13th day of June, in the year 1907, that leave is hereby granted to the Defendant to amend its pleadings in this case by filing two additional Pleas to the Declaration, as prayed.

THOMAS J. MORRIS,
Judge of the Circuit Court of the United States, for the District of Maryland.

The Plaintiff in the above entitled case hereby consents to the passage of the above Order.

W. CABELL BRUCE,
Att'y for Plaintiff.

20 *Defendant's Additional Pleas.*

Filed 13th June, 1907.

In the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE, a Corporation Duly Incorporated, Plaintiff,
vs.
HANNIS DISTILLING COMPANY, a Corporation Duly Incorporated, Defendant.

The Hannis Distilling Company, the Defendant in the above case, by Bernard Carter & Sons, its attorneys, with leave of Court first had and obtained, for additional Pleas to the Declaration filed in this case, and to each and every Count thereof, says:

For a First Plea, that it is a corporation duly incorporated under and by virtue of the Laws of the State of West Virginia, and always has been, since its incorporation, and is now, a citizen and a resident of the said State of West Virginia, and is not, and never has been a citizen or a resident of the State of Maryland; and that the Mayor and City Council of Baltimore, the Plaintiff in this case, is a corporation duly incorporated under and by virtue of the Laws of the State of Maryland, and is, and always has been, since its incorporation, a citizen and a resident of the State of Maryland, and never has been, and is not now, a resident or a citizen of the State of West Virginia. And this Defendant further says, that neither on the first days of January, in the years 1902 and 1903 respectively, nor at any time thereafter, did this Defendant own, nor was it the owner of, nor was there in its ownership, any of the barrels of distilled spirits mentioned respectively in the First and Second Counts of the Plaintiff's Declaration in this case, but on the contrary, all of the

21 said barrels of distilled spirits, on and after the first days of January in the years 1902 and 1903, respectively, were and ever since have been, owned by persons other than this Defendant, without this Defendant having any right, title or property, in any of the said barrels of distilled spirits, and that all of the said barrels of distilled spirits were so owned and were the absolute property of persons other than this Defendant, when all of the said barrels of distilled spirits were assessed by the State Tax Commissioner for the purpose of State and City taxation in the years 1902 and 1903 respectively, and when the respective tax levies were made on the said assessments by the respective City Ordinances for the years 1902 and 1903, as alleged respectively in the First and Second Counts of the Plaintiff's Declaration in this case; and so the Defendant says, that under the provisions of Article 15 of the Bill of Rights of the

Constitution of Maryland, as the same has been construed by the Court of Appeals of Maryland, the said Court of Appeals being the highest Court of the State of Maryland, the respective taxes levied on the assessed value of all of the said barrels of distilled spirits by the Ordinances aforesaid, for the years 1902 and 1903 respectively, were levied on the owners of said barrels of distilled spirits, who were and are persons other than this Defendant, and the said taxes were not, and could not lawfully have been, levied on this Defendant; and this Defendant further says, that on and since the first days of January in the years 1902 and 1903 respectively, all of the said barrels of distilled spirits, although stored in this Defendant's bonded warehouse, were and ever since have been stored therein under and subject to all the provisions of the Acts of The Congress of the United States, applicable to bonded warehouses in which distilled spirits are stored, and this Defendant has not now and never has had since the dates aforesaid any further custody and control of any of the said barrels of distilled spirits, than is allowed it by the said Acts
22 of The Congress of these United States, applicable to bonded warehouses in which distilled spirits are stored; and this Defendant further says that at no time prior to the first day of January in the year 1902, nor on that day, nor at any time since, has it had, nor has it now any moneys or credits in its hands, or under its control, belonging to the owners of said barrels of distilled spirits, mentioned in the Declaration in this case, out of or with which it could pay the taxes, or any part of them, alleged to be due and owing to the Plaintiff on the assessed value of said barrels of distilled spirits; and the Defendant further says it has not agreed with the Plaintiff or with the State of Maryland, to pay the said taxes alleged to be due and owing to the Plaintiff on the assessed value of said barrels of distilled spirits; and this Defendant further says that it has never borne any relation to the said owners of the said barrels of distilled spirits other than that of creditor for moneys due to this Defendant by the said owners from time to time for storage of the said barrels of distilled spirits in the Defendant's bonded warehouse; and so this Defendant says the Plaintiff is not entitled to recover from it any taxes whatever, in respect of the said barrels of distilled spirits mentioned in the Declaration in this case, and that if the Plaintiff is suffered by this Court to obtain Judgment against this Defendant for the taxes alleged to be due and owing it aforesaid, on which Judgment execution would be issued against the property of this Defendant, notwithstanding the facts and circumstances in this Plea above pleaded, the Defendant will be deprived of its property without due process of law, and against its rights secured to it by the provisions of the Fourteenth Amendment of the Constitution of the United States; wherefore, the Defendant prays the Judgment of this Court whether the Plaintiff can have and maintain this action against it.

And for a Second Plea to the said Declaration, and each and every Count thereof, the Defendant by its said attorneys says, that it is a corporation duly incorporated under and by virtue of the Laws
23 of the State of West Virginia, and always has been, since its incorporation, and is now a citizen and a resident of the said

State of West Virginia, and is not, and never has been, a citizen or a resident of the State of Maryland; and that the Mayor and City Council of Baltimore, the Plaintiff in this case, is a corporation duly incorporated under and by virtue of the Laws of the State of Maryland, and is, and always has been, since its incorporation, a citizen and a resident of the State of Maryland, and never has been, and is not now, a resident or a citizen of the State of West Virginia. And this Defendant further says, that neither on the first days of January, in the years 1902 and 1903, respectively, nor at any time thereafter, did this Defendant own, nor was it the owner of, nor was there in its ownership, any of the barrels of distilled spirits, mentioned respectively in the First and Second Counts of the Plaintiff's Declaration in this case, but on the contrary, all of the said barrels of distilled spirits, on and after the first days of January in the years 1902 and 1903 respectively were, and ever since have been, owned by persons other than this Defendant, who were and are, and ever since have been, non-residents of the State of Maryland, without this Defendant having any right, title or property, in any of the said barrels of distilled spirits, and that all of the said barrels of distilled spirits were so owned and were the absolute property of the said persons other than this Defendant, when all of the said barrels of distilled spirits were assessed by the State Tax Commissioner for the purpose of State and City taxation in the years 1902 and 1903, respectively and when the respective tax levies were made on the said assessments by the respective City Ordinances for the years 1902 and 1903, as alleged respectively in the First and Second Counts of the Plaintiff's Declaration in this case; and so the Defendant says, that under the provisions of Article 15 of the Declaration of Rights of the Constitution of Maryland, as the same has been construed by the Court of Appeals of Maryland, the said Court of Appeals being the
24 highest Court of the State of Maryland, the respective taxes levied on the assessed value of all of the said barrels of distilled spirits by the Ordinances aforesaid, for the years 1902 and 1903, respectively, were levied, if lawfully levied at all, on the owners of the said barrels of distilled spirits who were and are persons other than this Defendant, and who were and are and ever since the times aforesaid have been non-residents of the said State of Maryland, and that said taxes were not, and could not lawfully have been, levied on this Defendant; and this Defendant further says, that on and since the first days of January in the years 1902 and 1903, respectively, all of the said barrels of distilled spirits, although stored in this Defendant's bonded warehouse, were and ever since have been stored therein under and subject to all the provisions of the Acts of the Congress of the United States, applicable to bonded warehouses in which distilled spirits are stored, and this defendant has not now and never has had since the dates aforesaid any further custody and control of any of the said barrels of distilled spirits, than is allowed it by the said Acts of the Congress of the United States applicable to bonded warehouses in which distilled spirits are stored; and this Defendant further says that

at no time prior to the first day of January in the year 1902, nor on that day, nor at any time since, has it had, nor has it now, any moneys or credits in its hands or under its control, belonging to the owners aforesaid of said barrels of distilled spirits, mentioned in the Declaration in this case, out of or with which it could pay the taxes, or any part of them, alleged to be due and owing to the Plaintiff on the assessed value of said barrels of distilled spirits; and the Defendant further says it has not agreed with the Plaintiff or with the State of Maryland to pay the said taxes alleged to be due and owing to the Plaintiff on the assessed value of said barrels of distilled spirits; and that this Defendant has never borne any relation to the said owners of the said barrels of
25 distilled spirits, other than that of creditor for moneys due to this Defendant by the said owners from time to time for storage of the said barrels of distilled spirits in this Defendant's bonded warehouse; and this Defendant further says the said taxes alleged to be due and owing to the Plaintiff on the said assessed value of said barrels of distilled spirits were not and could not lawfully have been levied on the said owners of the said barrels of distilled spirits, all of the said owners being non-residents of the State of Maryland at the time and times aforesaid, and now are, non-residents of the State of Maryland; and so this Defendant says that the Plaintiff is not entitled to recover from it any taxes whatever in respect of the said barrels of distilled spirits mentioned in the Declaration in this case, and that if the Plaintiff is suffered by this Court to obtain judgment against this Defendant for the taxes alleged to be due and owing it aforesaid on which Judgment execution would be issued against the property of this Defendant, notwithstanding the facts and circumstances in this Plea above pleaded, the Defendant will be deprived of its property without due process of law, and against its rights secured to it by the provisions of the Fourteenth Amendment of the Constitution of the United States; wherefore, the Defendant prays the Judgment of this Court whether the Plaintiff can have and maintain this action against it.

BERNARD CARTER & SONS,
Attorneys for Defendant.

26 *Plaintiff's Demurrer to Defendant's Additional Pleas.*

Filed 18th June, 1907.

In the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE, a Corporation Duly Incorporated, Plaintiff,

vs.

THE HANNIS DISTILLING COMPANY, a Corporation Duly Incorporated, Defendant.

The plaintiff, by W. Cabell Bruce, its attorney, demurs to the first and second additional pleas filed by the defendant on the 13th day

of June, nineteen hundred and seven, and for ground of demurrer says, that the same are bad in substance.

W. CABELL BRUCE,
Attorney for Plaintiff.

Plaintiff's demurrer to the defendant's first and second additional pleas is hereby sustained.

THOMAS J. MORRIS, *Judge.*

27 *Petition of Plaintiff for Leave to Amend Declaration and Order of Court Thereon Granting Leave as Prayed.*

Filed 15th January, 1908.

In the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
HANNIS DISTILLING COMPANY.

To the Honorable, the Judge of said Court:

The Petition of the Mayor and City Council of Baltimore, the Plaintiff in the above entitled case, respectfully shows unto your Honor:

1. That the above suit was brought under the provisions of the Acts of the General Assembly of Maryland, of 1892, Chapter 704, as amended by the Acts of the General Assembly of Maryland of the year 1900, Chapter 320.

2. That the Defendant in this case, is about to sue out a Writ of Error in this Court to have the decision and judgment rendered by this Court in favor of the Plaintiff, reviewed by the Supreme Court of the United States, and in order to perfect the Record in this case, the Plaintiff desires to amend the Declaration in this case by inserting therein the following words: "That this suit is instituted under the provisions of Chapter 704 of the Acts of the General Assembly of Maryland passed in the January session 1892 as
28 amended by Chapter 320 of the Acts of the General Assembly of Maryland passed at the January Session 1900"; and prays the Court to grant it leave so to do.

As in duty, etc.,

W. CABELL BRUCE,
Att'y for Plaintiff.

Ordered, this 15th day of January 1908, by the Circuit Court of the United States for the District of Maryland, on the above Petition, that leave be, and is hereby granted to the Plaintiff to amend its Declaration as prayed.

THOS. J. MORRIS,
Judge of the Circuit Court of the United States for the District of Maryland.

The Defendant in the above case hereby consents to the passage of the above Order.

BERNARD CARTER,
SHIRLEY CARTER,
Att'ys for Hannis Distilling Company, Defendant.

29 *Petition of Defendant for Leave to Withdraw General Issue Pleas and Order of Court Thereon Granting Leave as Prayed.*

Filed 15th January, 1908.

In the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
HANNIS DISTILLING COMPANY.

To the Honorable the Judge of said Court:

The Petition of the Hannis Distilling Company the Defendant in the above case, respectfully shows unto your Honor:

1. That after the institution of the above case in the Court of Common Pleas of Baltimore City, and after the removal of the Record of said case to this Court, the Defendant in due course filed two Pleas to the Plaintiff's Declaration, to wit: the General Issue Plea in assumpsit, and the General Issue Plea in debt; and thereafter, with the leave of this Court first had and obtained, filed two additional Pleas to the Declaration, marked, "Additional Pleas 1 & 2."

2. That the Plaintiff in due course demurred to said Additional Pleas 1 & 2, which Demurrer was sustained by this Court.

3. That the Defendant now wishes to elect to stand on said Additional Pleas 1 & 2, and to petition this Court, after this Court has entered Judgment on the Demurrer of the Plaintiff to said Additional Pleas 1 & 2, for a Writ of Error to the Supreme Court of the United States, and therefore now prays the Court to
30 allow the Defendant to withdraw the two General Issue Pleas heretofore filed by it, so that it may elect to stand on said Additional Pleas 1 & 2, and so that Judgment may be entered thereon for the Plaintiff, and your Petitioner may apply for a Writ of Error as aforesaid.

And your Petitioner will ever pray, etc.

BERNARD CARTER,
SHIRLEY CARTER,
Att'ys for Defendant.

Ordered by the Circuit Court of the United States for the District of Maryland, this 15th day of January, 1908, on the above Petition, that leave be, and is hereby granted to the Defendant, to withdraw the General Issue Pleas heretofore filed by it in this case, as prayed.

THOS. J. MORRIS,
Judge of the Ct. Ct. of the United States for the District of Maryland.

The Plaintiff in the above case, Mayor and City Council of Baltimore, hereby consents to the passage of the above Order by the Court.

W. CABELL BRUCE,
Att'y for Mayor and City Council of Baltimore.

31 *Defendant's Notice of its Election to Stand on its Additonal First and Second Pleas.*

Filed 15th January, 1908.

In the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
HANNIS DISTILLING COMPANY.

MR. CLERK: The Defendant, with leave of Court first had and obtained, having withdrawn the two General Issue Pleas filed by it to the Declaration in this case; and the Court having heretofore sustained the Plaintiff's Demurrer to the Defendant's Additional Pleas 1 & 2, heretofore filed with leave of Court, the Defendant elects to stand upon said Additional Pleas 1 & 2, to which the said Demurrer was sustained, and declines to file any amended or additional Pleas to the Declaration in this case. The Court, therefore may enter Judgment against the Defendant for the want of Pleas to the Plaintiff's Declaration in this case, as it desires to apply for a Writ of Error to have the ruling and questions reviewed by the Supreme Court of the United States.

BERNARD CARTER,
SHIRLEY CARTER,
Att'ys for Defendant.

32 *Order of Court Entering Judgment for Plaintiff.*

Filed 15th January, 1908.

In the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
HANNIS DISTILLING COMPANY.

The Defendant in the above entitled case, having elected to stand on its additional Pleas 1 & 2, filed to the Plaintiff's Declaration in this case, the Demurrer to which Pleas was heretofore sustained by this Court; and the said Defendant having also declined to file any additional Pleas, it is hereby ordered by the Circuit Court of the United States, for the District of Maryland, this 15th day of January, in the year 1908, that Judgment be, and it is hereby entered

for the Plaintiff in the sum of $21,397.91, with Costs, with leave to the Defendant to apply for a Writ of Error.

THOS. J. MORRIS,
Judge of the Circuit Court of the United States for the District of Maryland.

33 *Petition of the Hannis Distilling Company for Writ of Error and Order of Court Thereon Allowing Same.*

Filed 15th January, 1908.

In the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
HANNIS DISTILLING COMPANY.

To the Honorable the Judge of said Court:

The Hannis Distilling Company, the Defendant in the above case, feeling aggrieved by the rulings of the Court upon the pleadings in this case, and particularly upon the rulings on the Demurrers interposed by the Plaintiff to the Defendant's Additional Pleas 1 & 2, and the Judgment entered for the Plaintiff, on the 15th day of January, 1908, comes now by Bernard Carter and Shirley Carter, its attorneys, and petitions this Court for an Order allowing said Defendant to prosecute a Writ of Error to the Honorable, the Supreme Court of the United States, under and according to the Laws of the United States, in that behalf made and provided; and also that an Order may be made fixing the amount of security which the Defendant shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error by the Supreme Court of the United States.

34 And your Petitioner will ever pray, etc.

BERNARD CARTER,
SHIRLEY CARTER,
Att'ys for Defendant.

Ordered by the Circuit Court of the United States for the District of Maryland, this 15th day of January, in the year 1908, that the Prayer of the aforegoing Petition be and the same is hereby granted, and that a Writ of Error issue as prayed, and that the penalty of the Writ of Error Bond is hereby fixed at Thirty thousand dollars, which when filed and approved, shall operate as a supersedeas.

THOS. J. MORRIS,
Judge of the Ct. Ct. of the United States for the District of Maryland.

35 *Assignment of Errors.*

Filed 15th January, 1908.

In the Circuit Court of the United States for the District of Maryland.

MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
HANNIS DISTILLING COMPANY.

Assignment of Error.

Now comes Hannis Distilling Company, the Defendant in the above case, and files the following Assignment of Error, upon which it will rely in the prosecution of the Writ of Error in the above entitled cause.

1. That the Circuit Court of the United States, in and for the District of Maryland, erred in sustaining the Plaintiff's Demurrers, filed respectively to the Defendant's Additional Pleas 1 & 2, to the Declaration in this cause, because in sustaining the said Demurrers to the said Pleas the Court held, that notwithstanding the matters and facts alleged in said Pleas respectively, the Defendant would not "be deprived of its property without due process of law," and would not "be denied the equal protection of the laws," within the meaning of the Fourteenth Amendment of the Constitution of the United States, and would not be denied any rights secured to it by that Instrument, if Judgment was rendered in this cause in favor of the Plaintiff, and against this Defendant.

2. That therefore the said Court erred in rendering Judgment against the Defendant in this cause upon the pleadings in said cause, and that said Judgment is contrary to the law and the facts as stated in the pleadings in this cause, and denies to this Defendant
36 rights secured to it by the Constitution of the United States, and especially by the Fourteenth Amendment thereof.

Wherefore, the said Defendant, the Plaintiff in error, prays that the Judgment of the said Court be reversed, and such directions be given that full force and effect may enure to this Defendant, the Plaintiff in error, by reason of the Additional Pleas 1 & 2, filed by it to the Plaintiff's, the Defendant in Error, Declaration in this cause.

BERNARD CARTER,
SHIRLEY CARTER,
Att'ys for Hannis Distilling Company, Plaintiff in Error.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Maryland, Greeting:

Because in the Record and proceedings, as also in the rendition of the Judgment of a Plea which is in the said case before you or

some of you, between Mayor and City Council of Baltimore and The Hannis Distilling Company, a manifest error hath happened, to the great damage of the said The Hannis Distilling Company, the Defendant, as by its Complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the Parties aforesaid in this behalf, do command you, if Judgment be therein given, that then under your Seal distinctly and openly, you send the Record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the Record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of January, in the year of our Lord one thousand nine hundred and eight.

[The Seal of the Circuit Court, Maryland.]

ARTHUR L. SPAMER,
Clerk of the Circuit Court of the United States for the District of Maryland.

Allowed by
THOS. J. MORRIS,
Judge of the Circuit Court of the United States for the District of Md.

38 *Writ of Error Bond.*

Filed 24th January, 1908.

Know all men by these presents, That the Hannis Distilling Company, a corporation duly incorporated, as Principal and the United States Fidelity & Guaranty Company, a corporation duly incorporated, as Surety, are held and firmly bound unto the Mayor and City Council of Baltimore, a corporation duly incorporated, in the full and just sum of Thirty Thousand ($30,000) Dollars, to be paid to the said Mayor and City Council of Baltimore, its certain attorney, successors or assigns, to which payment well and truly to be made, the said The Hannis Distilling Company and the United States Fidelity & Guaranty Company, bind themselves, their successors and assigns, jointly and severally by these presents; sealed with their seals and dated this 21st day of January, in the year of Our Lord 1908.

Whereas, Lately at a session of the Circuit Court of the United States, in and for the District of Maryland, in a suit depending in said Court, wherein Mayor and City Council of Baltimore, and The Hannis Distilling Company were Plaintiff and Defendant respectively, a Judgment was rendered against the said Hannis Distilling Company, and it having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the Judgment in the aforesaid suit, and a citation directed to the said Mayor and

City Council of Baltimore, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington on the day named in said citation.

39 Now the condition of the above obligation is such, That if the said The Hannis Distilling Company, shall prosecute said Writ of Error to effect, and answer all damages and Costs if it fails to make its Plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

THE HANNIS DISTILLING COMPANY,
[SEAL.] By H. J. M. CARDEZA, *Vice-President.*

Attest:
OSCAR WAGNER,
Ass't Secretary.

UNITED STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By RICHARD LANG, *Vice-President.*

Attest:
ALBERT H. BUCK,
Ass't Secretary.

Approved by
THOMAS J. MORRIS,
Judge of the Circuit Court of the United States for the District of Maryland.

40 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Mayor and City Council of Baltimore, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the 21st day of February next, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the District of Maryland, wherein Hannis Distilling Company is Plaintiff in Error, and you are Defendant in error, to show cause, if any there be, why the Judgment rendered against the said Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Thomas J. Morris, Judge of the said Circuit Court of the United States for the District of Maryland, this 24th day of January, in the year of our Lord 1908.

THOS. J. MORRIS,
Judge of the Ct. Ct. of the United States for the District of Maryland.

Attest:
[The Seal of the Circuit Court, Maryland.]
ARTHUR L. SPAMER,
Clerk U. S. Circuit Court for the District of Maryland.

41 [Endorsed:] Service of copy admitted this 28 day of Jan., 1908. W. Cabell Bruce, Sol'r for the M. & C. C. of Bal.

42 *Order to Transmit Record.*

In pursuance of the writ of error aforesaid, and according to the statute in such case made and provided, and of the order of Court here, a record of the judgment aforesaid, with all things thereunto relating, together with the said writ of error annexed, is hereby transmitted to the said Supreme Court of the United States, accordingly.

Test:

ARTHUR L. SPAMER, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA.
District of Maryland, To wit:

I, Arthur L. Spamer, Clerk of the Circuit Court of the United States for the District of Maryland, do certify that the foregoing is a true transcript of the record and proceedings of the said Circuit Court, together with all things thereunto relating, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, on this 3rd day of February, 1908.

[The Seal of the Circuit Court, Maryland.]

ARTHUR L. SPAMER,
Clerk of said Court.

Endorsed on cover: File No. 21,020. Maryland C. C. U. S. Term No. 75. The Hannis Distilling Company, plaintiff in error, *vs.* The Mayor and City Council of Baltimore. Filed February 15th, 1908. File No. 21,020.

[redacted]

In the

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 15.

[redacted]

THE HANNIS DISTILLING COMPANY,

Plaintiff in Error,

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendants in Error.

[redacted]

In Error to the Circuit Court of the United States for the District of Maryland.

[redacted]

BRIEF FOR PLAINTIFF IN ERROR.

[redacted]

[redacted]

Counsel for Plaintiff in Error.

Ring Bros., Printers, 413 E. Lexington Street, Baltimore, Md.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 75.

THE HANNIS DISTILLING COMPANY,

Plaintiff in Error,

VS.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendant in Error.

In Error to the Circuit Court of the United States for the District of Maryland.

BRIEF FOR PLAINTIFF IN ERROR.

This case is brought to this Court on a writ of error to the Circuit Court of the United States for the District of Maryland, under the provisions of sec. 5 of the Act of Congress of 1891; this case being one in which the construction and application of the Fourteenth Amendment of the Constitution of the United States to a statute of the State of Maryland is involved. Petition for Writ; Assignment of Errors, and Writ of Error—see Record, pages 21, 22, 23.)

This suit was instituted in the Court of Common Pleas of Baltimore City, in the State of Maryland, by the plaintiff below, defendant in error here, The Mayor and City Council of Baltimore, a municipal corporation of the State of Maryland, against the defendant below, plaintiff in error here, the Hannis Distilling Company, a corporation incorporated under the laws of the State of West Virginia; and the case was afterwards removed by the Hannis Distilling Company to the Circuit Court of the United States for the District of Maryland on the ground of diversity of citizenship of the parties to the case. (Petition for Removal, etc.—see Record, page 10, etc.)

STATEMENT OF THE CASE.

This is an action at law in *assumpsit* instituted by the defendant in error against the plaintiff in error to recover from the latter $18,218.77, the aggregate amount of taxes alleged to be due the defendant in error by the plaintiff in error on *the aggregate value* of barrels of distilled spirits which were on store in the plaintiff in error's warehouse in Baltimore City, Maryland, on the 1st day of January, in the years 1902 and 1903, respectively.

The suit is brought under the provisions of sections 214 to 224 of Article 81 of the Code of Public General Laws of Maryland, which sections are printed in full for the convenience of this Court in an Appendix to this brief. But for the purpose of continuity and clearness, we state the substance of said sections of the Code here, stating sec. 214 in full:

> "Sec. 214.—There shall be levied and collected upon all distilled spirits in this State, as *personal property*, the same rate of taxation which is imposed by the laws of the State on *other property* for State and county purposes."

Then by section 215, for the purpose of said levy and collection, it is made the duty of *every person or corporation* having custody of such spirits, in bonded or other warehouses, to make a report to the State Tax Commissioner on the 1st day of January in each and every year, of all spirits on hand at that date; and it is provided that the tax for the ensuing year, from said 1st day of January, shall be levied and paid on the amount of spirits so on hand.

The State Tax Commissioner is then required, by sec. 216, after notice to the owner, proprietor, distiller, or custodian, to value the distilled spirits reported to him as aforesaid, and to send his valuation to the County Commissioners and the Appeal Tax Court of Baltimore City, according as the distilled spirits reported as aforesaid are in the several counties or Baltimore City. It is then provided that all distilled spirits upon the valuation and return so made shall be subject to municipal and county taxation, *as all other personal property* within their bounds; and in making their annual levies, the County Commissioners and The Mayor and City Council of Baltimore are required to impose upon the spirits so returned and valued by the State Tax Commissioner the State taxes, as well as the county and municipal taxes.

Sec. 217 gives a right of appeal from the State Tax Commissioner's valuation.

Sec. 218 provides that the distiller, custodian, etc., shall make quarterly reports between the 1st and 5th days of January, April, July and October, in each year, showing all deliveries of spirits during the preceding current quarter from his custody or care; that he shall send one of these reports to the State Tax Commissioner and one to the Collector of Taxes for the county or city in which the distillery is situated, and with the latter make a remittance and payment of the tax upon such distilled spirits, which shall be accounted for by said officer as other State and county taxes are accounted for.

Then sec. 222 (it not being necessary to state secs. 219, 220 and 221) provides:

> "Any warehouseman, custodian, or agent paying the tax on distilled spirits herein provided for shall have a lien upon the distilled spirits covered by such tax."

It has been held by the Court of Appeals of Maryland, in construing the above statute, that sec. 218, requiring quarterly *reports and payments* applies *only* to *spirits* that have come into the custody of the distiller, custodian, etc., *after* the 1st day of January in any year; and that taxes in respect of spirits on hand on *January 1st* in any year, are payable *when all other City and State taxes are payable.*

Monticello vs. City, 90 Md. 427.

Such are the essential provisions of the above sections of the Code of Maryland, under which this suit was instituted.

CONSTRUCTION PLACED BY HIGHEST COURT OF MARYLAND ON ABOVE SECTIONS OF CODE.

Before stating the allegations of the declaration and the pleas filed thereto in the case we wish to call the Court's attention to the construction placed upon the above sections of the Maryland Code by the Court of Appeals of Maryland, the highest Court of the State, in connection with the Constitution of the State, so that the applicability of the pleas to the declaration will more clearly appear than it otherwise would if the language of the sections alone was considered.

Although the language of the said sections of the Code would seem to provide for the levy or imposition of a tax *in rem* upon the *spirits* and upon the *custodian*, the Court of Appeals of Maryland, in construing the above sections of the

Code in relation to the 15th Article of the Bill of Rights of the Constitution of Maryland, in cases where it was contended that said *sections* of the Code were in *conflict* with said Article of the *Constitution,* for the *very reason* that said sections provided for the levy or imposition of the *tax in rem* on the *spirits,*or *in personam* on the custodian, the Court of Appeals *flatly* and beyond all *controversy* held, that the tax provided for by said sections was *a tax* upon the OWNERS of the spirits *in personam, and not a tax in rem upon the spirits; and not a tax upon the warehouseman or custodian* of the spirits, if he was *not the owner.*

With the above statement of the Court of Appeals' construction of the sections of the Code above mentioned, to be substantiated by quotations from the decisions themselves hereinafter, we come now to the declaration and the pleas in the case. (Record, pages 2, 14, 15, 16 and 17.)

In the declaration it is alleged in substance:

First Count—That there was in the ownership and possession or custody of the defendant on the 1st day of January, in the year 1902, 50,996 barrels of distilled spirits, upon which the State Tax Commissioner duly made an assessment of $8.00 per barrel, amounting in the aggregate to $407,968, for purposes of State and city taxation for the year 1902; upon which assessment the Mayor and City Council of Baltimore levied, by ordinance, a tax of $1.95 per $100 for city purposes for the year 1902; that said tax, with interest and penalties, to date of this suit (July 6th, 1904), amounts to $9,259.28, and the defendant has refused to pay the same, although due and payable to the plaintiff.

The second count, in the same language as that of the first, claims taxes due for the year 1903 on the valuation of 54,414 barrels of distilled spirits, at $8.00 per barrel, the total value being $435,312, the tax rate being $1.86\frac{3}{4}$, and the total amount alleged to be due being $8,959.49.

To the above declaration the defendant, plaintiff in error, filed two pleas (Record, pages 14, 15, 16 and 17), which, in substance, are as follows:

That the defendant was not on the 1st day of January, in the years 1902 and 1903, nor at any time since has it been, the *owner of any* of the distilled *spirits* mentioned in the plaintiff's declaration, but that *all* of said spirits were on said days, and ever since have been, *owned* by persons *other than* this defendant, without this defendant having any *right, title or property* in said spirits, and that under the provisions of Art. 15 of the Declaration of Rights of the Constitution of Maryland, *as construed* by the Court of Appeals, the highest Court of the State of Maryland, the said taxes *were levied* on the *owners* of said spirits, persons other than this defendant, and *were not and could not* lawfully have been levied on this defendant; that since the 1st day of January, 1902 and 1903, respectively, although stored in this defendant's bonded warehouse, the defendant has had no further custody or control over said spirits than is allowed it by the Acts of the Congress of the United States applicable to Bonded Warehouses wherein distilled spirits are stored; that the defendant has *not now* and *never has had* any *moneys* or *credits* in its hands or under its control *belonging* to the said *owners* of said spirits out of or with which it could pay the taxes, or any part of them alleged to be due; that the defendant *has not agreed* with the plaintiff nor with the State of Maryland *to pay* the said taxes; that the defendant has never borne any *relation* to the said *owners* of said spirits other than that of *creditor* for moneys *due to this defendant by said owners,* from time to time, for storage of the said spirits in the defendant's bonded warehouse; and that therefore the plaintiff is not entitled to recover from it any of the taxes alleged to be due; and that if the Court allows the plaintiff a judgment against this defendant for the said taxes alleged to be due, notwithstanding the matter and facts above pleaded, on which

judgment execution will be issued against the *property of this defendant,* the defendant will be deprived of its property "without due process of law," and against its rights secured to it by the provisions of the Fourteenth Amendment of the Constitution of the United States; and then defendant prays judgment of the Court whether the plaintiff can have and maintain this action against it.

The second plea contains the same allegations as the first, with the additional fact alleged that the said *owners* of said spirits were on January 1st, 1902 and 1903, and always have been, *and now are, non-residents* of the State of Maryland, being residents of other States; and that said taxes alleged to be due and owing to the plaintiff on the assessed value of said spirits *were not, and could not,* lawfully have been *levied* on the said *owners* of said spirits, *all* of said owners being *non-residents* of the State of Maryland at the time and times aforesaid; and that therefore the plaintiff is not entitled to recover from the defendant any taxes whatever in respect of the said spirits; and that if the Court allows the plaintiff a judgment against this defendant for the said taxes alleged to be due, on which judgment execution will be issued against the defendant's property, notwithstanding the matters and facts above pleaded, the defendant will be deprived of its property without due process of law, and against its rights secured to it by the provisions of the Fourteenth Amendment of the Constitution of the United States; and the defendant prays the judgment of the Court whether the plaintiff can have and maintain this action against it.

To the above pleas the plaintiff filed a demurrer, stating as the ground therefor that said pleas "are bad in substance." (Record, pages 17 and 18.)

This demurrer was sustained by the Circuit Court of the United States, and the defendant, having elected to stand on said pleas and having declined to file any further plea, judg-

ment was entered accordingly for the plaintiff against the defendant in the sum of $21,697.91, with costs (Record, pages 20 and 21); and thereupon the defendant sued out the writ of error upon which the case is brought to this Court for review. (Record, pages 21, 22, 23.)

ASSIGNMENT OF ERROR.

Briefly stated, the assignment of error (Record, page 22) is that, by sustaining the demurrer to the defendant's pleas and entering judgment thereon, the Circuit Court of the United States for the District of Maryland has adjudged that, notwithstanding the matters and facts set out in said pleas, the plaintiff in error will not be deprived of its property without due process of law, and will not be denied the equal protection of the laws; and will not be deprived of any rights secured to it by the Constitution of the United States or by the Fourteenth Amendment thereof, if it is forced to pay the taxes alleged to be due the defendant in error.

THE ISSUE.

It thus appears that the questions before this Court are questions *of law*, upon the facts stated in the above pleas; which facts, of course, are admitted for the purposes of, and by, the demurrer.

Before stating the contentions or propositions of constitutional law, to be maintained by the plaintiff in error, we wish to state here, with the promise to substantiate the statement hereinafter, that the questions raised for decision in this case were not *raised* nor decided by this Court in Carstairs vs. Cochran, 193 U. S. 10.

CONTENTIONS.

A.

The legal proposition embodied in the first plea, and for which the plaintiff in error will contend in argument, is this:

That the Court of Appeals of Maryland, the highest Court of the State, has decided that, by the Constitution of Maryland, the Legislature's *power to tax* is *limited* and *confined* to the levying or *imposition* of *taxes* on the *owners* of property *in personam*, and that the Legislature cannot impose taxes on *property in rem*, nor upon the *custodian* or *possessor* of *another* person's property. And the said Court, in construing the *statute* above set forth, by which the *taxes*, in this case sued for, are imposed, has held: That in accordance with the *Constitution* of the *State*, the said statute imposes the taxes upon the *owners* of the spirits *alone*, *in personam*, and *not* upon *the spirits in rem*, and *not* upon the *distiller, warehouseman or custodian*, if he does not own the spirits.

The defendant in error, by its demurrer, *admits as true* the following facts alleged in the 1st plea, to wit: That the defendant, plaintiff in error here, *is not*, and *was not*, when the taxes sued for were imposed, THE OWNER of the *spirits;* but that the same were OWNED by persons *other than* this defendant; that the defendant *never has had* any *money* or *credits* in *its hands* belonging to the OWNERS of said spirits; that the defendant has never borne any *relation* to the said OWNERS other than that of *creditor* for moneys due the defendant from time to time by the OWNERS for storage of *their* spirits in the defendant's warehouse.

Therefore we contend that, since the Court of Appeals of Maryland has held that, by the Constitution of Maryland, no one can be taxed by the Legislature except the OWNER of property, and that *property cannot be* taxed, nor the *cus-*

todian or possessor of it, if he does not *own* it; and since, in construing the statute imposing the taxes in this instance, the said Court has held that the taxes imposed by it are imposed upon the OWNERS *alone,* and not upon the *property* and not upon the *custodian* or possessor of the spirits; and since it is admitted by the demurrer to the plea that this defendant is not the OWNERS of the spirits, but the mere *custodian* of them, the taxes *sued for not only* HAVE NOT BEEN imposed by the statute on this *defendant,* but could *not have been* so imposed by virtue of the Constitution of Maryland, as construed by its highest Court, whose decision in that respect is, of course, binding on this Court.

From the above it is evident, that the defendant does not owe the money sued for *because it has been taxed,* or because *Maryland's taxing power has been exercised upon* the defendant; since the highest Court of Maryland has decided *not only* that the *defendant has not been taxed* by the statute here in question, but also that it could *not have been* taxed; by virtue of the Constitution of Maryland, by which the Legislature's *power to tax is limited and confined to the* OWNERS *of property in personam;* and that it cannot tax *property in rem, nor the custodian or possessor* of another person's property; and it is admitted that *this defendant is not the* OWNER *of the property* in this case, in respect of which the taxes have been imposed upon its OWNERS, and on them *alone, in personam;* the value of the spirits merely measuring the *owner's taxable worth.*

Assuming, that we have correctly stated the construction placed upon the *statute* and upon the *Constitution* of the State by its *highest* Court, we start with the proposition: That the Legislature of Maryland, by virtue of the State Constitution, not only *has not exerted* the State's *taxing power* against this defendant, but even if it had *wished* to do

so it could not have *gratified* its wish, because *prohibited* from so doing by the State Constitution, as construed by the highest Court of the State.

Therefore, it cannot be asserted in this Court that the money sued for is due from the defendant because the *taxing power* of the State of Maryland has been *exercised* against, and has imposed the OBLIGATION on, the defendant to *pay the money* to the State's agent *as taxes,* because, as we have seen, that *power* of the *State,* to wit, the *taxing power,* by virtue of the *prohibition* of the State Constitution, *could not be exercised* upon the defendant, since not the OWNER of the property in respect of which the taxes have been imposed on its OWNERS *alone.* Then, if the Legislature has *not imposed,* and *could not* impose, the *obligation* on the defendant to pay the money sued for to the State or its agent by the constitutional exercise of the State's POWER OF TAXATION (which is an undisputed fact in this case), by the exercise of *what power,* possessed by the State, has the State *obligated* the defendant *to pay the money sued for?*

In the answer to this question lies the whole contention of the plaintiff in error under its first plea; and, stated as briefly as possible, it is this:

That a State of our Union has but *two* powers by the exercise of which private property can be taken for public use—one is the *taxing power,* and the other the right or *power of eminent domain.* And although these two powers are most alike in their ultimate purposes, they are not essentially the same, the distinction between them being clearly pointed out by the Court in the case of People vs. Brooklyn, 4 Comstock, 423, where the Court says:

> "Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken, not as the owner's

share of contribution to a public burden, but as so much *beyond his share.* Special compensation is therefore to be made in the latter case, because the Government *is a debtor* for the property so taken, but not in the former case, because the payment of the taxes is a *duty* creating no *obligation to repay,* otherwise than in the proper application of the tax."

And since it has been decided by the highest Court of the State of Maryland that the money sued for in this case is not due from the defendant, because the *State* has exercised its *taxing power* against the defendant; *since* that POWER could not have been *constitutionally* exercised *against* the *defendant;* then it must be *due,* if due at all, because the State has exercised its *only remaining* power, by which it could compel the defendant to deliver up its property or money for public use; and that power is the *power* or right of *eminent domain.* And although the highest Court of the State of Maryland has held, in effect, by declaring the statute constitutional, that the Legislature has lawfully exercised the State's power of eminent domain, by enacting that the defendant, although against its will, shall pay to the State the taxes due by the *owners,* who *alone* are TAXED, and who *alone* could be *taxed,* and reimburse itself by *collecting* from the *owners,* or by executing the lien given by the statute on the *owner's* property; the plaintiff in error contends that, although the highest Court of the State is the final arbiter to decide whether its Legislature has exercised this last-mentioned power in accordance with the State *Constitution;* yet, since the power of eminent domain of a State is a power *regulated* by the Fourteenth Amendment of the Constitution of the United States, this Court, the Supreme Court of the United States, is the final arbiter to decide whether the Legislature of Maryland has exercised the *power* in accord-

ance with the provisions of the Fourteenth Amendment of the Constitution of the United States. And the plaintiff in error contends further that, since the "due process of law" clause of the said amendment requires a *full and perfect* PECUNIARY *compensation* to be given by a State to the OWNER of private property taken for public use—that is to say, *money* must be given for property, and not *property* for *property*, and not *property* for *money;* and since, by the statute here in question, the State takes the *private property* or *money* from the defendant, and in return therefor gives him but a LIEN on the PROPERTY of other persons, the statute, if effectual, deprives the defendant of its property "without due process of law," within the meaning of the Fourteenth Amendment to the Constitution of the United States. Therefore, the demurrer to the plaintiff in error's first plea was erroneously sustained by the Circuit Court of the United States for the District of Maryland, and the judgment entered thereon should be reversed and a new trial ordered.

(*a.*)

Or, to state the proposition more briefly, having fully above explained its parts, the plaintiff in error's contention under its first plea is this:

A State of the United States has but *two* powers, by the exercise of which it can compel a person, against his will, to deliver up his *own private property* for public use, to wit, its *power* of *taxation*, and its *power* of *eminent domain*. The highest Court of the State of Maryland has decided that, under the Constitution of the State of Maryland, the payment demanded in this suit, under the statute in question, *is not*, and *could not be*, demanded of the defendant by the lawful exercise by the Legislature of the State's power of taxation. And since it *is not*, and *could not be*, demanded under the

State's *power of taxation,* as limited by its Constitution, it must be demanded, and the payment enforced, if at all, by virtue of the only remaining power the State possesses, to wit, its power of eminent domain. And, although the highest Court of Maryland has held, in effect by upholding the statute, that this *latter power* has been exercised by the Legislature of Maryland in strict accord with the *State* Constitution; yet, since the exercise by the State, through its Legislature or other agency, of this power of eminent domain is regulated by the "due process of law" clause of the Fourteenth Amendment to the Constitution of the United States, the Supreme Court of the United States, and *not* the highest Court of the State, is the final arbiter to decide whether the Legislature of Maryland, by the statute in question, has exercised the State's power of eminent domain in accordance with the Fourteenth Amendment to the Constitution of the United States. And since this Court, in construing the Fourteenth Amendment to the Constitution of the United States, has held that when private proprty is taken by a State under its power of eminent domain a *full and perfect pecuniary* compensation must be made to the owner; and since, by the statute here in question, the defendant's *own money or private property* is taken by the State, and a *mere lien* on another person's *property* given in return; the statute is in conflict with the Fourteenth Amendment to the Constitution of the United States, and is therefore null and void as applied to this defendant; and therefore the demurrer to the defendant's first plea was erroneously sustained; and the judgment entered thereon should be reversed and a new trial ordered.

So much for the statement of the plaintiff in error's contentions under the demurrer to its first plea.

B.

The plaintiff in error will contend under its second plea:

That the Court of Appeals of Maryland, the highest Court of the State, has decided that, by the Constitution of the State, taxes must be imposed on the OWNERS of property *in personam*, and cannot be imposed upon property *in rem*, and cannot be imposed upon the *custodians* of property *owned* by other persons; and the said Court has held, in construing the statute here in question, that the taxes by it imposed have been imposed in strict accordane with the State Constitution—that is to say, have been imposed by the statute upon the *owners* of the spirits *in personam*, and not upon the spirits *in rem*, nor upon the *custodian* of the spirits.

That it is alleged in the plea, and therefore admitted by the demurrer to be true, that *all the owners of all the spirits* mentioned in the declaration in this case *always have been*, and still are, non-residents of the State of Maryland, being residents of other States. The plaintiff in error contends therefore that, since the taxes in this case sued for were imposed, if imposed at all, upon the *non-resident owners in personam*, and have not been imposed *in rem* upon said *non-resident's* spirits in the State of Maryland, nor upon the *custodian* of the spirits, the plaintiff in error here; and since, by virtue of the "due process of law" clause of the Fourteenth Amendment of the Constitution of the United States, the State of Maryland neither through its Legislature nor any other agency could impose any *personal obligation* on the said *non-resident owners* to pay said taxes; and since by the Constitution of the State no other than a *personal obligation* could be imposed; and since the statute here in question has been held by the highest Court of the State to be in strict accord with the State Constitution in that respect; it follows that no *personal obligation has been or could be* imposed on said *non-resident* owners by virtue of the Fourteenth Amendment of

the Constitution of the United States; and therefore, there are no taxes due to the State from said *non-resident owners.* And since there are no taxes due from said non-resident *owners,* there are no taxes for the plaintiff in error to collect from said *owners* for the State; and therefore there are no taxes which the State can demand from the plaintiff in error as her collector, the *only relation* which the plaintiff in error bears to the State, as has been expressly decided by the Court of Appeals in construing the statute here in question.

And the plaintiff in error contends further, under its second plea, that since no *personal obligation* has been imposed upon said *non-resident owners,* and since no tax has been imposed *in rem* upon said non-resident owner's *spirits* in the State, there is nothing due to the State, either from the non-residents *personally* or from their *spirits* in the State; and therefore, the State of Maryland has no valid claim for taxes either against the non-resident owners *in personam,* or against the spirits *in rem;* and therefore the State cannot give the plaintiff in error, her collector, any right to reimburse itself, either against the non-resident *owners in personam,* or against their spirits *in rem,* for any taxes it might pay the State for said *non-resident owners;* and therefore if the plaintiff in error, *not taxed,* is compelled to pay the taxes here sued for, it will be deprived of its property by the State or its agent without compensation, and therefore "without due process of law," within the meaning of the Fourteenth Amendment to the Constitution of the United States. Therefore the demurrer to the defendant's second plea was erroneously sustained by the lower Court, and the judgment entered thereon should be reversed and a new trial ordered.

(*b*)

To state the above proposition more briefly: That since the Court of Appeals of Maryland, the highest Court of the

State, in construing the statute here in question, has held: That by virtue of the Constitution of Maryland, the *tax* imposed by the statute is a *tax in personam* upon the *owners* of the spirits, and not a *tax in rem* on the *spirits*, and is not a *tax* upon the *custodian* of the spirits, if he is *not the owner;* and since the OWNERS *of all* the spirits in this case always *have been, and still are, non-residents* of the State of Maryland, being residents of other States, the State of Maryland *could not*, had *no power* by virtue of the Constitution of the United States, the Fourteenth Amendment thereof, to levy the *tax in personam* upon said *non-resident owners;* and since *no tax* has been lawfully levied upon said *non-resident owners*, no taxes can be *lawfully collected* from them by the State of Maryland by *any process* whatever, and therefore the State *cannot, and has no power to*, compel this defendant, *not taxed*, to pay the supposed taxes out of its *own private property or money, without* the State *giving*, or having any *power* to give it, any right whatever *in personam* against the *non-resident owners* outside of the State of Maryland, or *in rem* against their property within the State of Maryland; since the defendant would thus be deprived of its property *without compensation*, and therefore without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States; and therefore the demurrer to the defendant's second plea was erroneously sustained and the judgment thereon unlawfully entered, and should be reversed and a new trial ordered.

C.

CONSTRUCTION OF STATE CONSTITUTION AND STATUTE BY HIGHEST COURT OF MARYLAND.

The above being the plaintiff in error's contentions, and since the whole foundation of each of them is the *construction*

placed by the highest Court of the State of Maryland upon the statute here in question, in connection with the Constitution of the State of Maryland, we will now show that we have *literally* and *correctly* stated the construction put upon the statute here in question; and the construction put upon the State Constitution in connection with said statute, by the Court of Appeals of Maryland, the highest Court of the State.

In the case of Monticello Co. vs. Baltimore, 90 Md. 416, when this statute first came before the Court of Appeals for construction, and where it was contended that the statute was in conflict with the Fifteenth Article of the Bill of Rights of the Constitution of Maryland, in that the statute imposed the tax *in rem* on *the spirits*, and not *in personam*, upon the OWNERS, and was therefore unconstitutional, the Court of Appeals, in answer to and in disposing of this contention, at page 416 said:

> "Taxes of the kind here dealt with are, under Article 15 of our Declaration of Rights, levied *not on things*, but on the *owners* of things; and the *value* of the things *owned* fixes the *measure* of the *owner's* liability to contribute in taxes towards the support of the government. This is an axiom of political economy, no less than a fundamental provision of our organic law. It cannot, therefore, be presumed that the Legislature deliberately intended to disregard this principle, and to place the tax on the *spirits*, and not on the *owners* of them. 'Every *person* in the State,' says the 15th Article of the Declaration of Rights, 'or *person* holding property therein, ought to contribute his proportion of public taxes for the support of the government, *according* to his *actual worth* in real and personal property.' It is the *individual*, then, who is *in* the State, or *who* holds property therein that is *liable to taxation*. *He* may *be out* of the State, *he* may be a *non-resident*, but if *he* has property situated here, *he* is as much bound to contribute to the support of the government, according to the value of that property as

though *he* were domiciled within the limits of the Commonwealth.

* * * * * * * * *

"Though the language employed, like that used in many assessment laws, if read literally, would indicate an intention to impose the tax on the *property*, and not on the *owner* of it, that is not its meaning when considered in connection with the *settled policy* of Maryland as announced in the Declaration of Rights, and we hold, therefore, that the tax is upon the *owners* of *the spirits*, and not upon *the spirits*."

The above language was quoted at length, and affirmed by the Court of Appeals in the case of Carstairs vs. Cochran, 95 Md., at page 500, where the statute here in question was again before that Court for construction.

Then in the case of Appeal Tax Court vs. Patterson, 50 Md., at page 371, referring to its decision in Latrobe vs. Baltimore, 19 Md. 18, the Court says:

"This Court held: That Art. 15 of the Bill of Rights, declaring that every *person* holding property in this State ought to contribute *his* proportion of public taxes, according to *his* actual *worth* in real or personal property, meant a *legal obligation* to contribute taxes, and such *obligation* could *only* be imposed on the *person* holding the *legal estate*."

And that this *legal obligation* is enforceable by the action of *assumpsit* was expressly held in the same case.

Again, in the case of U. S. Elec. Co. vs. State, 79 Md. 63, page 71, the Court of Appeals says:

"Taxes are levied upon the *individual* and *not* upon *property*, though the *value* of the property *owned* by *him* is the *standard* by which the extent of the *individual's liability* is ascertained and measured."

It is clear, therefore, that the tax levied by this statute, and that by force of the Constitution of Maryland, is levied on the OWNERS, *in personam*, of the spirits; *persons* having the *legal title*, and *not* upon the *spirits, in rem;* and *not* upon the mere bailee or *custodian* of them.

But that the *distiller, custodian* or *warehouseman*, if he is not the OWNER of the spirits in his custody, is not *taxed* with respect to them is shown by the express decision of the Court of Appeals in the case of Fowble vs. Kemp, 92 Md. 630, in which case Kemp, distiller and bonded *warehouseman*, was resisting, by way of injunction, the attempt of Fowble, the Treasurer and Tax Collector of Baltimore County, to collect taxes in respect of spirits OWNED by *other persons*, though stored in Kemp's warehouse, by *distress* upon the *property* of Kemp, under the provision of the Maryland Code permitting distress for *taxes due* by *persons taxed*, as supplementary to the action of *assumpsit*. In holding that the Tax Collector could not collect the *taxes due* by the OWNERS of the spirits by distress on the *warehouseman's property*, since the taxes were *not due* by *him at all* as a *taxpayer*, the Court, at page 638, said:

> "But *the liability* of the appellees to pay the *tax due* by the *owners* of the distilled spirits is a liability *unlike that* which they are under to *pay taxes* on spirits that *they own*. In the one case this *liability* is that of a *collector* for the State; in the other, it is that of owners. An *owner* of property holds it subject to the right of the State to seize it upon summary process for the non-payment of taxes. As *collector* for the State the *same person* is not liable to have his own property seized under the same process for the *non-payment of taxes* NOT ACTUALLY DUE BY HIM AT ALL. This has been expressly ruled in Hull vs. Southern Dev. Co., 89 Md. 8. In speaking of the liability of a corporation to pay the tax assessed against its shareholders, it was said in the case just

named: 'The sole liability of the corporation *grows out of the statutory duty to collect*, and not out of *its failure* to *pay a tax primarily due* by *it*. *The* corporation *owes the money* to the county, NOT AS TAXPAYER, but as *tax collector*, and the prescribed process against *the one* is not available against *the other*.' The appellant should have brought suit in a Court of law upon the *statutory obligation* (to collect), and when *judgment* was *recovered execution* could be issued, and *any* property owned by the appellees (the distillers) could be levied on and sold."

It is clear, from the above decisions, that the tax imposed by the statute here in question is imposed and levied upon the *owners* of the spirits *in personam*, and is *not* levied or imposed upon the *spirits in rem*, nor upon the *custodian* of them; and this, too, not merely by *choice* of the Legislature of Maryland in enacting this statute, but per force of the 15th Article of the Bill of Rights of the Constitution of Maryland, as construed by the Court of Appeals of Maryland, which Article of the Constitution of Maryland, we have seen, the Court of Appeals has held, *limits* and *confines* the Legislature's *power to tax* to the imposition of taxes on *persons in personam*, who *own*, have the *legal title* to property, and on them *alone*, and prohibiting the imposition of taxes on property *in rem*, or upon the *person* who does *not own*, or does not have the *legal title*, but merely the *custody* of the property.

D.

Since the Court of Appeals of Maryland, the highest Court of the State, in construing the Constitution of the State, has so *held*, it is clear that, by that instrument the *Legislature's power to tax* in Maryland is not that *broad power* which every State of our Union possesses in the *abstract*, and which the Legislature of nearly every State of our Union, with the *ex-*

ception of *Maryland,* has the right to exercise in the *concrete,* decsribed by Mr. Chief Justice Marshall in McCulloh vs. Maryland, where he said:

> "It is obvious that it (the taxing power) is an incident of sovereignty, and is co-extensive with that to which it is incident. *All subjects* over which the sovereign power of a State extends *are objects* of taxation, * * * ;"

but, on the contrary, that the *Legislature's power to tax* in Maryland, instead of *extending over "all subjects over* which the *sovereign power* of the State extends," extends *only* over *persons* who *own property;* and they are the only *objects* of *taxation* in Maryland; and that it does not extend *over property in rem,* nor over the *custodian* of property *owned* by other persons; and that neither the *property* nor the *custodian* of property are *objects of taxation* in Maryland.

Since the Court of Appeals has so held, it cannot be said, we, with all respect, submit, that the Legislature of Maryland "has the undoubted *power to tax private property* having a *situs* within the territorial limits, and may require the *party* in *possession* of the property to *pay* the *taxes thereon;*" or that Maryland's Legislature could enact a statute, under its *taxing power* as *limited by* the Constitution of the State, providing "that tangible personal property shall be assessed, *either to the* OWNER or *other person having it in charge,*" since we have seen, by the repeated decisions of the highest Court of Maryland, that *property cannot be taxed at all,* nor can the mere *custodian* of it, but the OWNER of *property,* and the OWNER OF property *alone* can be *taxed* in Maryland.

It is obvious then, we think, that the principles just above quoted, could only be applicable and be law in those States, in which the Legislature's power to tax is unlimited, except by the principles of uniformity and equaltiy, and where therefore the Legislature can *tax* the *possessors* of property as well as *owners,* and can tax *property in rem.*

SINGULAR LIMITATIONS ON LEGISLATURE'S POWER TO TAX IN MARYLAND NOT BROUGHT TO THIS COURT'S ATTENTION IN CARSTAIRS' CASE.

Therefore, when this Court applied those principles just above quoted, and held them applicable to the State of Maryland, and to be powers exercisable by Maryland's Legislature, in affirming the Court of Appeals' judgment in the case of Carstairs vs. Cochran, 193 U. S., page 10, in which the statute here in question was involved; this Court must have so held, because the *singular limitations* placed upon the *taxing power* of the Legislature of the State of Maryland by the Constitution of the State of Maryland, as repeatedly construed by the Court of Appeals, were not brought to the attention of this Court, in the record, arguments or briefs. And those *singular limitations* not having been brought to the attention of this Court in that case, this Court rightfully assumed that Maryland's Legislature had the power to exercise to the full extent the taxing power possessed by the Legislatures of nearly all other States of the Union, subject only to the principles of equality and uniformity, to wit, to tax persons *or* property; persons *and* property; persons *in personam,* or property *in rem;* the *custodians* or *possessors,* as well as *owners;* and *custodians* of property in the State, although the property is absolutely *owned* by persons without the State. That this Court so assumed is shown by the decisions of this Court cited in support of its judgment.

Thus, in Coe vs. Eroll, 116 U. S. 517, this Court held: That personal property situated in States other than the domicil of the owner could be taxed *in rem* in the State where situated, notwithstanding the *owner* was taxed *in personam* in respect of the property in his *home* State, the property being *valued* in ascertaining his *personal worth.*

Marye vs. B. & O. R. Co., 127 U. S. 117, 123, decides that movable *property* of the B. & O. R. Co. *situated* in Virginia is taxable there *in rem,* but the State had not imposed any tax upon it, but only on the property of its own corporations.

Pullman's Car Co. vs. Pennsylvania decides that the Pullman Car Co.'s *cars* habitually used within the State of Pennsylvania could be taxed by that State.

In Ficklin vs. Shelly County, 145 U. S. 1, 22, this Court held: That income on commissions derived from *business* done in Tennessee is taxable in that State.

In New Orleans vs. Stempel, 175 U. S. 309, it is decided that notes and mortgages situated in New Orleans and belonging to a non-resident are taxable *in rem* in New Orleans by Louisiana.

In Board of Assessors vs. Compton National, 191 U. S. 388, this Court held: That checks in Louisiana evidencing credits are taxable in that State *in rem,* although belonging to a non-resident.

In Merchants' Bank vs. Pennsylvania, 167 U. S. 461, this Court held: That an Act of Pennsylvania is constitutional which excepts personal property of banks from taxation if they pay the tax on shares on or before a certain date, but which imposes a tax on personal property if they fail to pay the tax on shares on the date fixed; the plaintiff in error asserting that it was denied the equal protection of the laws.

It is evident also that because the *singular limitations* placed upon the Legislature's *power to tax* by the Constitution of Maryland, as construed by the Court of Appeals, were not brought to the attention of this Court in the Carstairs Case, that this Court was misled to believe that the Legislature of Maryland could *tax* property *in rem* and the *custodian* or *possessor* of it, by the fact that the Court of Appeals quoted cases and authorities in its opinion in that case, which *announced* and *sustained* those principles and that view. But

if this Court's attention had been called to the *singular limitations* put upon the Maryland Legislature's *taxing power* by the *State Constitution*, as construed so often by the Court of Appeals, this Court, we feel confident, would have seen that the said quotations and citations, made by the Court of Appeals, and the said principles stated by it, were *not* so quoted and stated as *evidencing* an *intention* of the Court of Appeals, to *change or alter the construction* so repeatedly placed by it upon the State Constitution with regard to the *taxing power* of the Maryland Legislature; but on the contrary, this Court would have seen, that said cases were cited, and said principles quoted and stated, to sustain the Court's contention, to wit, that *notwithstanding* the fact that, under the Constitution of Maryland the Legislature has *no power* to tax *property in rem*, or mere *custodians*, or *possessors of property*, but can only tax the *owners* of property *in personam alone;* yet it can make persons *not taxed*, and who *cannot* be *taxed*, *agents* of the State, against their will, to collect taxes due only by the *owners;* and although such *agents* are mere *collectors*, and not *taxpayers*, or persons subject to the *taxing* POWER, the Legislature is not confined to the remedy of distress or attachment of the property of the only *true debtors* of the State, to wit, the OWNERS *taxed;* but can compel the collector, *not taxed*, to deliver up his *own* property to pay the debt of the *owner taxed* and *taxpayer;* and this on the ground alone that the State must have its money when due. And if its *real and only debtor, the person taxed*, does not pay, the State is not forced, like any other *creditor*, to sue the *debtor* or levy distress upon *his property*, but that the State possesses power *somewhere* to take the property of another person, *not the State's debtor*, and who could not be made *its debtor, by taxation*, to satisfy the *debt* due by its *only debtor;* and to *compel* that other person, *not taxed*, and who could not *be taxed*, to reimburse himself at his own expense, by suit or *lien* on *property* from the State's only *debtor*.

It was to *sustain* the above *contention,* and not to *change* or *alter* its long well-settled *construction* of the State Constitution as to the *limitations* on the *power* of the Legislature *to tax,* that the Court of Appeals stated the principles and quoted from the cases cited in its opinion to which we have referred; for example:

As an authority for the above, we think, untenable contention, the Court of Appeals cites Commonwealth vs. Gains, 80 Kentucky, 489, and at page 507 of 90 Md., Carstairs Case, says:

> "Finally in the case of Commonwealth vs. Gains, a statute in every respect similar to that in our State has been declared constitutional and valid. In that case one of the questions considered by the Court was stated by it in these words: 'Was the whiskey rightfully assessed to the *appellees,* who are *not the owners,* on the ground alone that they were the *possessors* of it on January 10th, 1880?' And in answering this question the Court said: 'The relative rights which may exist between the *owner* and *possessor* of the whiskey *cannot* affect the *power* of the State to authorize its *assessment to either* of them, as the *Legislature may deem most prudent and apt* to result in securing taxes from *them;* indeed, convenience and necessity unite in support of the *well-established doctrine,* that the TAXING POWER may impose *taxes* upon PERSONS or PROPERTY, and may adopt remedies for their collection which operate against the person of the *owner* or *the possessor,* or the *thing* taxed, or *all* of them *combined.*'"

It is, of course, evident to this Court from the above quotation that the Legislature of Kentucky, unlike that of Maryland is not *limited* by the Constitution of that State to the imposition of taxes on the *owner of property alone in per-*

sonam; but that Kentucky's Legislature can tax the *possessor* or *custodian* of property, as well as the *owner*, and can tax the property *in rem*. And, unlike the *custodian or warehouseman* in Maryland, the custodian or possessor in Kentucky is a *taxpayer*, the person *taxed*, in conjunction with the whiskey.

This is shown also by this Court's decision in the case of Thompson vs. Kentucky, 209 U. S. 340, in which case the plaintiff in error complained that since an officer of the State had misinterpreted the *law*, by which the plaintiff in error was *taxed* with whiskey in his warehouse (and so *taxed because* he was *the possessor* of it), and by this misinterpretation the plaintiff was forced to pay interest to the State which he had failed to demand from the *owner*, also *taxed;* that if the State forced him to pay the interest he would be deprived of his property without due process of law, this Court, at page 346, said:

> "But from this situation this Court cannot give relief. Due process of law does not assure to a *taxpayer* the interpretation of laws by the executive officers of a State, as against their interpretation by the Courts of the State, or relief from the consequences of a misinterpretation by either."

Based upon the same principle, that the Legislature unless *restrained* by the *State Constitution*, can *tax* both the *property* and the *possessor* or *custodian* of it, irrespective of who *owns* the property, are all the cases cited by Judge Cooley in his work on Taxation, to sustain the proposition quoted by the Court of Appeals in the Carstairs Case, 95 Md., at page 503, to wit:

> "Statutes *sometimes* provide that tangible personal property shall be *assessed* wherever in the State it may be, either to the *owner himself*, or to the *agent or other person having it in charge*, and there is no doubt of the

right to do this whether the owner is resident in the State or not."

We concede, of course, that the above principle can lawfully be applied, but only where it is applicable—that is, in those States where the Legislature's *power to tax is not* restricted, as it *is* restricted in the State of Maryland; and therefore, where the Legislature can tax the *possessor*, as well as *owner*, and can also *tax* the property *in rem*.

In referring, in the Carstairs Case, to the statute in Maryland requiring the tenant of a leasehold estate to pay taxes due by the lessor, and giving the tenant the right to reimburse himself by deduction from rent or a suit at law against the landlord, the Court of Appeals, if the two statutes were the same in principle and practice, is but stating as a reason for upholding one statute contended to be unconstitutional another statute likewise unconstitutional, if the first one is. But the statute here in question and the landlord and tenant statute, are not the same either in principle or practice.

The tenant is generally a tenant for 99 years, with the right to renew the term forever, at a *small* rent reserved compared with the value of the leasehold estate. And so the tenant is *practically* the owner in fee; and if the owner in fee, he would be taxed in respect of the property. But the landlord is considered the owner in fee, and he alone is taxed with respect to the fee value of the property. If the landlord should fail to pay his taxes, the State would have the right, in addition to an action of *assumpsit*, to sell the property; and in case of a sale the landlord's loss would be small, the tenant's great; yet if without the statute making him liable for the taxes of the landlord, the tenant should pay the taxes to save his own property from absolute sale, he would make a gratuitous payment without the request of the landlord, and would have no right to reimburse himself either by deduction of rent or suit at law. It is clear, therefore, that the landlord and tenant statute is a favor and not a burden to the tenant.

On the other hand, the *custodian* has no interest in the spirits. It would make no difference to him if they were sold by the State for taxes; he would not be richer or poorer or inconvenienced in any way. Yet, if he does not pay the tax, *not levied on him* and for which *his property* could not be *touched* by the State by distress, as for taxes due; he is sued *at law;* can make no defense; judgment is entered; and any and *all his property* may be taken to satisfy the judgment. The whole proceeding, based on a statute, *not taxing him*, the Constitution of the State of Maryland prohibits the Legislature to *tax him;* but he is made by statute an *officer* of the *State, against his will;* made to *hire clerks to keep the State's tax accounts;* and as *collector*, without *recompense* or *pay*, must pay all *taxes* which he is required to collect; and then recover them the best way he can from those who are alone the *debtors* of the State.

Two statutes seeming to be alike could not well be more contrary in principle or practice. Further than that, every lawyer in Maryland knows that the landlord and tenant statute could not well be brought in question by the tenant, since every lease contains a covenant by which the tenant binds himself to pay all taxes, etc., in respect of the demised premises, as the Court of Appeals notes in the case cited by the Court in the Carstairs Case, 50 Md. 397, *nor was the constitutionality of the statute raised in that case.*

Finally on this part of this case, a further reason, why we feel confident the *singular limitations* placed by the Constitution of Maryland on the Legislature's *power to tax* were not brought to the attention of this Court in the Carstairs Case, is, this Court's judgment in the case of Corry vs. Baltimore, 196 U. S. 466. In which case the question was, whether the State of Maryland could tax a *non-resident* of the State *in personam* who owned stock in a Maryland corporation. The argument of the plaintiff in error was that, as the authority of the State of Maryland to tax is limited by the effect of the

Fourteenth Amendment to the Constitution of the United States to *persons* and *property within* the jurisdiction of the State, and as the tax in question, per force of the Constitution of the State, was not imposed by the statute *in rem* against the stock, but was *in personam* against the *owner*, and not *against* the *corporation*, the power attempted to be exercised, as it imposed a *personal liability*, was wanting in due process of law. The principles stated by this Court in the Carstairs Case would have been a flat answer to the above contention of Corry, if they could be held applicable in the State of Maryland, notwithstanding the *singular limitations* placed upon the *taxing power* by the State Constitution; since this Court, if said principles were applicable to the State of Maryland, could have held that, since the *situs* of the stock by law was within the State, a fact *admitted* by Corry, "Maryland had the undoubted power to tax *private property* having a *situs* within its territorial limits, and could require the *party in possession*, the corporation, to pay the taxes thereon," a State generally having the right to tax *property* and the mere *possessor* or *custodian* of it.

But this Court in that case had brought to its attention the *singular limitation* placed by the State Constitution on the Legislature's *power to tax* in Maryland, as is shown by the following statement made by Mr. Justice White in this Court's opinion, at page 472 of 196 U. S.:

> "The Maryland decisions have also *settled* that the tax is on the *stockholder personally* (italics ours), because of his ownership of the stock, and not on the *stock in rem* or *on the corporation.*"

Therefore, this Court could not have applied, and did not apply, the principles stated by it in the Carstairs Case, but held, in substance, that since the State of Maryland was the *creator* of the *stock* and of the *corporation*; as *creator*, she could place such reasonable *conditions* as she pleased on her

creatures; and having created the stock with the *condition,* that whoever became its owner should be *personally liable* to pay a tax to the State or its *collector,* the corporation, based on the value of the stock; and Corry having become the owner of the stock under those conditions; his relation to the *State, and its collector,* the corporation, was a *contractual* relation, and not the relation of a *subject* to his *sovereign.*

Further, that the corporation was created with the condition imposed upon its being, that it should pay to the State, out of its *own funds,* if necessary, the amount due by its *stockholders* in respect of their stock; therefore, the corporation's relation to the State was a contractual relation in this regard, and the corporation was not a *taxpayer* or *taxed* by the State.

Or, to state the above principle in the clear language of the opinion of this Court in the Corry Case:

> "The principle upheld by the rulings of this Court to which we have referred concerning the taxation by States of stock in national banks, is *that the sovereignty* which *creates a corporation* (italics ours), *has* the incidental *right* to impose reasonable *regulations* concerning the *ownership* of *stock therein,* and that *a regulation* establishing the *situs* of stock for the purpose of taxation and *compelling the corporation to pay the tax* on behalf of the *shareholder,* is not *unreasonable* regulation. Applying this principle, it follows that a *regulation* of that character, prescribed by a State *in creating a corporation is not* an *exercise* of the *taxing power* of the *State* over persons and things not subject to its jurisdiction. And we think, moreover, that *the authority* so *possessed* (creator over its creature) by the State *carries with it* the *power* to *endow* the *corporation* with a right of recovery against the stockholder for the tax which it may have paid on his behalf."

We have seen that this Court decided in the Carstairs Case that *property* could be *taxed in rem* in Maryland, and also that the *custodian* or *possessor* as distinguished from the *owner*, could be *taxed* in Maryland. We have seen also that the highest Court of Maryland, in construing the State Constitution, and in construing the statute here in question, has repeatedly decided that the Legislature's *power to tax*, in Maryland, is *limited*, by the Constitution of the State, to the OWNERS of property, *in personam*; that it cannot tax property *in rem*; and that it cannot tax the *custodian or possessor* of property, owned by other persons; and that the Legislature's power to tax in Maryland is *so limited*, has been affirmed by this Court in the case of Corry vs. Baltimore. That we have not misunderstood what was decided by this Court in the Carstairs Case is shown by what was said by this Court, through Mr. Justice McKenna, in delivering this Court's opinion in the case of Thompson vs. Kentucky, 209 U. S., at page 347:

> "The scheme of the statute is simple, and it is an exercise of the power, which we said in Carstairs vs. Cockran, 193 U. S. 16, the State (of Maryland) undoubtedly possessed 'to *tax private property* having a *situs* within its territorial limits.' * * * The proposition was indeed considered as elemental and as requiring nothing more than the illustration of cases."

It is obvious, from the foregoing, that the decision of this Court in the Carstairs Case, is in *direct conflict* with the decisions of the highest Court of Maryland as to the *objects* upon which the Legislature's *power to tax* can be exerted, under the Maryland Constitution. This Court holding that the *property*, and *custodians of other* persons' property can be lawfully *taxed* by Maryland's Legislature. The highest Court of Maryland holding, that by the State Constitution the Legislature's power *to tax is limited to the owners* of property, *in*

personam, and that neither *property*, nor the mere *custodians* or *possessors* of property can be taxed.

This Court held in the Carstairs Case, that because Maryland's Legislature *had* the *power to tax* him with spirits in his possession, the *custodian* was not deprived of his property without due process of law. The highest Court of the State of Maryland holds, that notwithstanding that, by the Constitution of Maryland, the Legislature has *no power to tax* the *custodian* of another person's property, and cannot tax the *property*, but must tax the *owner alone in personam*; and that the statute here in question is in strict accord with the Constitution in that respect, in that the custodian of the spirits is not taxed, *nor* are the *spirits taxed*, but the OWNER of the spirits and the OWNER *alone* is taxed; yet, that the Legislature has the power (it must then be by right of eminent domain) to *compel the custodian, not taxed*, of the spirits, *not taxed, against his will*, under the statutory name of *collector*, to deliver up his *own money or property* to the State to cancel the debt of the OWNER, *alone taxed*; and to accept a mere *lien* on the *owner's spirits* as a *full, perfect pecuniary compensation* for his *money*; or, if the *custodian* fails to pay on demand, the State, or its agent, may sue the *custodian* at law, to which action he can make no defense if he is *custodian* of another person's spirits; a judgment is entered with costs; his *own private property*, not the *spirits* of the *owner*, is taken in execution of the judgment, and not even the lien on the spirits is left him to recoup any part of his loss. The statute, thus construed, the plaintiff in error contends, deprives it of its property "without due process of law," within the meaning of the Fourteenth Amendment of the Constitution of the United States. And the plaintiff in error so contends, *not* because the highest Court of Maryland has held that the Legislature has the right to compel the *custodian* of *another* person's property, to do the things complained of, by the constitutional exercise of Maryland's *taxing power*; but, on the

contrary, the plaintiff in error so contends for the *very reason* that the highest Court of Maryland has held, that by reason of the *limitations* placed upon its *power to tax* by the Constitution of the State, the Legislature not only *could not*, but *does not*, through the statute, compel the plaintiff in error to do the things complained of by the exercise of the State's *taxing power*, but by a power independent of and distinct from the taxing power, which the plaintiff in error contends can be no other than the right of eminent domain.

Therefore, the questions, raised by the Record and to be decided by this Court in *this case, are not*, what is the extent of Maryland's taxing power; and whether a custodian of property is an object of that power, which this Court considered (because the *singular limitations* on the taxing power were not brought to the attention of this Court) to be the questions before it in the Carstairs Case. Those questions, as answered by the highest Court of the State and as so answered recognized by this Court in Corry vs. Baltimore, are taken as *postulates* in this case, to wit, that Maryland's *taxing power* does not extend to property *in rem;* and does not extend to *custodians* of another person's property; but is limited and confined in its exercise to the *owners* of property *alone*, the *value* of the property merely measuring the OWNER'S *taxable worth in personam*. But the question in this case is, under the 1st plea: Has the Legislature of Maryland, by the statute here in question, exercised the State's right *of eminent domain*, in accordance with the "due process of law" clause of the Fourteenth Amendment of the Constitution of the United States; or, in brief, is the State statute in conflict with the Fourteenth Amendment of the Constitution of the United States?

And, under the second plea, the question in this case is: That since the State's *taxing power is limited to the owners of property in personam*, and since all the OWNERS of all the

property in this case always have been and are non-residents of the State of Maryland; and since by the Fourteenth Amendment of the Constitution of the United States Maryland's Legislature was without power to levy a *personal obligation* on said *non-resident owners*, and therefore there are no taxes due from them to the State of Maryland; and since this defendant *is not taxed* and the property is *not taxed;* and since by the statute the defendant's property is taken from him, not by the State's *taxing power*, but by its right of eminent domain, to pay the taxes attempted to be levied, but *not* levied, on the *non-resident owners;* and without the right or the power to give, and therefore not giving, the defendant any right over against the non-resident *owners* or *their property*, and without compensating the defendant otherwise; the defendant, the plaintiff in error, contends that the exercise by the Legislature of the State of the State's right of eminent domain, as exercised by the statute, under the above circumstances, is not in accord with the "due process of law" clause of the Fourteenth Amendment of the Constitution of the United States; and therefore the question is in this case under the 2nd plea: Is not the statute here in question, under the above circumstances, in conflict with the Fourteenth Amendment of the Constitution of the United States?

It is obvious from the foregoing that this Court in the Carstairs Case, *assuming* (its attention not having been called to the contrary *fact*) that Maryland's TAXING POWER, like that of all other States, could be exercised upon all persons and property within the State, considered that the only question before this Court was, whether Carstairs Bros. and the spirits in their possession were *objects of that power*, and decided that they were.

In the case at bar we state, *as settled* by the highest Court of the State of Maryland, and recognized as *settled* by this Court in Corry vs. Baltimore, that neither the *plaintiff in*

error nor the spirits in its possession are *taxed;* and are not objects of the State's *taxing power;* and then ask this Court to decide whether the exercise by Maryland's Legislature of the State's power or right of eminent domain, by the statute, is in accord with the "due process of law" clause of the 14th Amendment of the Constitution of the United States.

Therefore, the questions raised for decision by this Court in *this case* were not raised or decided by this Court in Carstairs vs. Cochran; and the latter case, consequently, cannot be held as an authority against or as deciding the questions raised for decision in this case.

Although the question raised here, under the 1st plea, could have been raised perhaps in the Carstairs Case, yet it was not raised or decided in that case, and therefore the decision in that case is not conclusive upon this. As was said by this Court in Dewy vs. Des Moines, 173 U. S., at page 200:

> "A claim or right which has never been *made* or *asserted* cannot be said to have been *denied* by a *judgment* which does not *refer* to it. A point that was *never raised* cannot be said to have been *decided adversely* to a party *who never set it up or* in any way alluded to it. Nor can it be said that the *necessary effect in law* of a judgment which is *silent* upon the question is the *denial of* a claim or right which *might have been* involved therein, but which *in fact* was never in any way *set up or spoken of.*"

And, bottom page 199:

> "It is not enough that there may be somewhere hidden in the record a *question* which if *raised* would be of a Federal nature."

In addition to the *facts*, admitted by the plaintiff's demurrer to the defendant's pleas to be true, to wit, that the de-

fendant was not on January 1st, 1902 and 1903, and never has been since, the OWNER of the spirits mentioned in the declaration; that defendant has never had any funds or credits in its hands belonging to the *owners* of the spirits out of or with which it could pay the taxes alleged to be due; that the defendant has never borne any other relation to said *owners* than that of creditor; and has never agreed with the plaintiff or the State of Maryland to pay the taxes alleged to be due; we have also established, by the express decisions of the Court of Appeals, the highest court of the State of Maryland, in construing the *State Constitution* and the *statute* here in question, *as facts*, to wit, that the defendant is *not taxed, and could not be taxed*, with respect of the spirits here in question, since it is but the *custodian* of them, and *not the owner* of them; and that the spirits are not *taxed in rem*; and *that the taxes* here sued for have been imposed on the *owners* of the spirits alone, *in personam*.

With the above facts clearly before the Court, we now come to present our argument to maintain the propositions of law set out above under the heads "A" or "a," and "B" or "b."

ARGUMENT.

PART 1.

A.

It will be conceded, we think, by this Court, as a self-evident proposition of Constitutional Law, that the United States, collectively, and the individual States, separately, have but two powers, by the exercise of which, private property, whether real or personal, can be taken for public use;

one is the *taxing power* and the other the power or right of *eminent domain;* excepting, of course, the very few instances where State or Federal exercise of the police power, deprives persons of the use of, or destroys, their property. If private property, then, is taken for public use, it must be taken, by a State, either by its power of taxation or by its power of eminent domain.

It will be conceded also that these two powers, although most alike in their ultimate purpose, are not essentially the same. The distinction between them is clearly pointed out, by the Court, in the case of People vs. Brooklyn, 4 Comstock, 423 and 425, as noted, *supra,* where the Court says:

> "Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken, not as the owner's share of contribution to a public burden, but as so much *beyond his share.* Special compensation is therefore to be made in the latter case, because the Government *is a debtor* for the property so taken, but not in the former case, because the payment of the taxes is a *duty* creating no *obligation to repay,* otherwise than in the proper application of the tax."

We have seen that the plaintiff in error, the *custodian* only of spirits *owned* by other persons, *is not taxed* in respect of said spirits, and *could not be,* by virtue of Article 15 of the Declaration of Rights, which limits the Legislature's exercise of the State's taxing power to the owners of the spirits alone; that the plaintiff in error is not obligated to the State through the exercise of its taxing power, which cannot be exercised against it, unless the owner of property, but its obligation grows out of a statutory duty imposed by the Legislature, entirely independent of, and distinct from, its

exercise of the State's taxing power, commanding it to pay *taxes* due by *other persons*, against whom the State's taxing power has been exerted, because they are the owners of property.

But if the plaintiff in error (hereinafter called defendant) is not obligated to the defendant in error (hereinafter called the plaintiff) by the exercise of the State's *taxing power;* whence arises the Legislature's power to impose this duty and obligation on the distiller, when the *possessor* or *custodian merely*, of property owned by other persons, who alone are taxable in respect of it, to pay the taxes so due by other persons; to hand over to the State or its agents it own private property, at the State's mere command, to satisfy a debt due to the State by other persons, and not due by it at all, so far as the State exercising its taxing power could make it due by the defendant, unless by the exercise of the State's *right of eminent domain.* And if the proposition with which we started is sound, it must be by this power, which we will now show. We will then show that by the manner in which this power has been exercised by the Legislature through the Statute, here in question, the defendant is deprived of his property without due process of law, within the meaning of the 14th Amendment of the Constitution of the United States.

B.

If the Statute, here in question, applied to corporations alone, and they were the only persons owning distilleries in the State, it might be argued that the Legislature had the right to impose, this duty and obligation, on the distillers, of *paying* to the State taxes due by the *owners* of spirits stored in their warehouses, by exercising the right of the State, as creator, to impose whatever duties and obligations it may see fit upon its creature, under its constitutional right of alter-

ing, amending and repealing corporate charters; just as the State has already done, by requiring corporations, created by it, to pay to the State taxes due by their stockholders to the State, irrespective of whether or not the corporations have any dividends or profits, in their possession, belonging to the stockholders, out of which they might pay the tax, not due at all by the corporation, as we have seen, *supra,* but by the stockholders personally. As was said by Mr. Justice White, in delivering the opinion of this Court, in the case of Corry vs. Mayor and City Council of Baltimore, 196 U. S. at page 476, already cited, *supra*:

> "The principle upheld by the rulings of this Court to which we have referred, is *that the sovereignty* which *creates a corporation* (italics ours), *has* the incidental *right* to impose reasonable *regulations* concerning the *ownership* of *stock therein,* and that *a regulation* establishing the *situs* of stock for the purpose of taxation and *compelling the corporation to pay the tax* on behalf of the *shareholder,* is not *unreasonable* regulation. Applying this principle, it follows that a *regulation* of that charter, prescribed by a State *in creating a corporation is not* an *exercise* of the *taxing power* of the *State* over persons and things not subject to its jurisdiction. And we think, moreover, that *the authority so possessed* (creator over its creature) by the State *carries with it* the *power to endow* the *corporation* with a right of recovery against the stockholder for the tax which it may have paid on his behalf."

The above was said in that case, to meet the argument, that as Corry was a non-resident of Maryland, and Maryland levies taxes *in personam* on the stockholder, and not *in rem* on the stock, nor on the corporation, Maryland cou'd not collect the tax, since she had no right to levy it on the object of its taxing power, to wit, the stockholder, who was beyond her jurisdiction.

But the answer to this as we have seen was, that since the above regulation was a part of the charter of the corporation, which the State as its creator had a right to impose, and since the stockholder assented to that regulation by purchasing stock in the corporation, he had thereby *agreed* that he should be taxed, in the mode prescribed, and that the corporation should pay the tax for him; and therefore it was not necessary for Maryland to exercise its taxing power against him, or the corporation, which it could not do as to him because he was a *non-resident*, and which it did not and could not do, as to the corporation, by force of the 15th Article of the Bill of Rights, since the tax was on the *owner* of the stock.

In other words, as we have already stated *supra*, the relation of both Corry and the corporation to the State was a *contractual* relation; and *not* the relation of *subjects* to a *sovereign* as regards taxation.

But since the statute here in question by its express terms applies *to individuals* or partnerships as well as *to corporations*, it would be a most violent presumption to assume, that the Legislature intended to exercise the power of the State to which we have above alluded, which is confined to corporations created by the State, in imposing the duty and obligation on the distillers, as custodians of spirits, owned by other persons, of paying the taxes due by such owners to the State and reimbursing themselves by suit or otherwise. For, since the statute, by its terms, applies to *individuals* as well as to corporations, no rule of construction would allow us to assume, that the Legislature meant it to be enforced as to corporations, on any principle that could not apply with equal force to individuals; nor can we infer that the Legislature would have passed the measure at all if it could not apply with equal force to all persons who are included within its terms. If it can not stand as to individuals, it must fall as to corporations.

As was said by Mr. Chief Justice Fuller, in delivering the opinion of this Court after the re-argument in the income tax cases, Pollock vs. Farmers' Loan & Trust Co., 158 U. S., at page 636:

> "It is undoubtedly true that there may be cases where one part of a Statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but *these* are cases where *the parts* are so *distinctly separable* that *each* case stands *alone,* and where the Court is *able* to *see,* and to *declare,* that the *intention* of the Legislature *was* that the *part* pronounced *valid* should be enforceable, even though the *other part* should *fail.* To hold otherwise would be *to substitute,* for the law *intended* by the Legislature, *one* they may never have been willing by *itself* to enact."

See also—Employers' Liability Cases.

But even assuming that this Court will hold, that the principle, here in question, while only applicable to corporations, and not to individuals, since the latter are not beholden to the State for their right to exist and to hold property therein, yet, that the Legislature intended the statute to be applicable to corporations alone, if it could not be made to apply to individuals; then, we submit, that since individuals own warehouses in which distilled spirits are stored, under the same conditions in every respect as corporations, if the Legislature should pass an Act, such as the one in question, and make it applicable to corporations alone, the Act would be invalid, under the Constitution of the United States, in that it would be a denial by the State, to the corporations owning warehouses in which distil'ed spirits are stored, of the equal protection of the laws. This on the authority of this Court, in the case of Railroad Co. vs. Ellis, 165 U. S. 150, in which it was held: that a statute of a State was in conflict with the above provision of the Constitution of the United States,

which required all railroad companies in the State who overcharged for freight or upon whose lines freight was damaged or cattle killed, to pay, in addition to the regular costs of suit in the State Courts, a counsel fee of $10 to any one who was injured by any of the acts of the companies, provided the companies forced him to bring suit and were defeated in the suit.

This Court holding: that although the law applied to all railroad companies, and had relation only to such acts as they could commit or be guilty of, yet the law, to be valid, would have to be made to apply to all persons in the State who were necessarily comprised in the *object* to which the law applied, and in that case that class was, all debtors who refused to pay their debts, and were defeated in suits, brought by their creditors.

Here there can be no doubt that individuals, as well as corporations, who own warehouses in which distilled spirits are stored, are equally within the object of the law; and if the law applied to corporations alone, it would be invalid on the principle announced in the above case.

It is obvious, then, we think, from the above, that this law cannot be enforced against this defendant, on the principle that the soverign, which creates, can put what conditions of existence it sees fit on its creature; *and that no principle can be applied to sustain it, that is not as applicable to individuals as to corporations.*

C.

It may be argued also, that the principle upon which this law can be sustained, is the well-established principle of *garnishment*, which, of course, is as applicable to individuals as to corporations; and the case of National Bank vs. Com-

monwealth, 9 Wall. 353, etc., will be cited in support of the assertion; in which case the bank was resisting the State in the assertion of the right to collect from the bank, from *monies* in its *possession belonging* to its *stockholders,* taxes due the State by the *shareholders.*

In upholding the right of the State to do this, the Supreme Court, page 362, says:

> "If the State of Kentucky had a claim against a stockholder of the bank who was a *non-resident* of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or *garnished,* and *made* to *pay* the *debt out* of *the means* of its *shareholder* under its *control.* This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is *no greater interference with* the *functions* of the *bank,* than any other legal proceeding to which its business operations may subject it, and it in *no manner hinders it* from performing *all duties* of financial agent of the government."

It has been noted, by this Court, in the above case, that although the bank itself was not subject to the State's taxing power, yet the State could collect the tax due by the shareholders on their shares, which were subject to the taxing power of the State, from the bank, by way of *garnishment out of monies in* the bank's control *belonging* to the *shareholders.*

It has been admitted by the demurrer to the 1st and 2nd pleas in this case, that the defendant never has had in its hands *any money or credits* belonging to the *owners* of the spirits; and therefore no *money* can be demanded from the defendant as belonging to the State's debtor's, the *owners* of the spirits, by any known principle of garnishment. The State may take the spirits, of the *owners,* in the defendant's

warehouse, to satisfy the *personal obligation* of the *owners* for taxes, which is in the nature of a judgment, but nothing more. As was said by this Court, in the case of Wanzer vs. Truly, 17 Howard, at page 587, Mr. Justice Campbell speaking for the Court on the rights of an attaching creditor against the garnishee:

> "The rule of law is accurately stated by Vice Chancellor Wigram who says: 'That a creditor, under his judgment, might take in execution all that belongs to his debtor and nothing more. He stands in the place of his debtor.'"

And unlike the slaves in that case the spirits produce no money for the garnishee while in his possession; but on the contrary as it admitted by the demurrer the *owners* become the *debtors* of the *warehouseman* for rent for space in his warehouse for storage of the spirits.

But it will now be shown by other decisions of this Court that if the bank itself is not subject to the State's taxing power, or if the principle considered in Section B of this brief is not applicable to the corporation, a State can not compel the corporation to pay the tax due by its shareholders out of *its own funds* and collect from the shareholders, by suit or otherwise, in a case where the bank or corporation has no *money belonging* to shareholders in its possession out of which to pay the tax due by the *shareholders* to the State.

In the case of Aberdeen Bank vs. Chehalis County, 166 U. S. 440, the bank resisted the right of the county to collect from it taxes due by its stockholders, the bank asserting that the shares of stock were the property of the individual stockholders, and that the bank could not be made responsible for a tax levied on those shares, and could not be compelled to pay such tax to the county. This contention was denied by this Court, applying and affirming the case in 9 Wall., *supra*.

But the Court was very careful to say, on page 446, in its opinion:

> "It is *not alleged in the bill or claimed in argument that the bank was not in possession of funds* BELONGING to the STOCKHOLDERS SEVERALLY, *sufficient* to *pay* the *tax* proportioned to their ownership of the stock."

Again, in the case of New Orleans vs. Huston, 119 U. S., 265, where the Louisiana Lottery Company, which, by the Constitution of Louisiana, was not subject to the State's taxing power beyond $40,000 per annum, and where a tax law levying a tax upon the shareholders of the Company in respect of their shares of stock, provided that the Company should pay the tax due by the shareholders and collect from them, the Court denying the right of the City to force the Company to pay the taxes, on page 278 of the opinion, says:

> "In the present case the corporation is exempted by its charter from all taxes and licenses of any kind whatever, in excess of the sum of $40,000 per annum, and yet by Act No. 77, though the assessment is not made upon *its capital stock*, but *upon* the *shares of shareholders* appearing upon its books, nevertheless, *the tax* so *assessed* is *to be paid by the Company* although it is *entitled* to *collect* the *amount so paid* from *the shareholder* on *whose account* it is payable; but *this payment* by the Company is to be made *irrespective* of any *dividends* or profits *payable* to the *shareholder* out of *which* it *might* be *repaid.*" * * *
>
> "The *taxes* are *assessed* upon the *actual shares as registered* in the names of individual *shareholders*, but are to be paid by the corporation, so that while the mode and form of taxation is changed, its substance remains as though assessed against the corporation by name."

Then, after distinguishing the case in 9 Wall. 353, *supra*, the Court, on page 279, says:

> "A tax such as that sought to be imposed upon the company by the appellees, is a tax upon the corporation within the meaning or the prohibition of its Charter (no dividends or profits belonging to shareholders, *because* it is compelled to *become surety* for *taxes* nominally *imposed* upon its *stockholders*, and is made liable, primarily for their payment; *a payment* which, in *the first instance, must be made* out of the *corporate property*, without other recourse than an action against individual *stockholders to recover* the *amounts advanced* on *their account.*"

Once more: In the case of New Orleans vs. Citizens' Bank, 167 U. S. 382, where the charter of the bank provided that all profits, *except a certain small fraction*, should become capital, which was pledged to secure certain bonds; and where the State taxed the *shares of stock to the shareholders*, and commanded the bank to pay the tax as collector for the State, the bank itself not being subject to the State's taxing power, it was held by the lower Court, on page 382, this Court quoting the opinion of the State Court:

> "It is, we think, manifest that the bondholders are to be paid out of the profits of this bank by perference, and before any *dividend* can be *declared* or *distributed* to *shareholders*. It is not shown or pretended that the bank has in its *possession* any *funds which it could legally distribute* to its shareholders, or which it *could pay* to them, *without* a manifest *violation* of its charter. If *voluntary* payments to or *for account of its shareholders* would violate its charter, and be a breach of contract with the State and its bondholders, forced payments would be equally so. The authorities cited by the defendants are inapplicable to the present case. Where

the capital, assets and profits of the bank are at the disposal of its shareholders, the State may perhaps compel the bank to pay their taxes on stock. But such legislation with reference to the Citizens' Bank would be violative of the *vested rights of others*, and as we think, unconstitutional."

In all the above cases from 9th Wa'l. down, it is expressly decided, that a corporation, although itself not subject to the *taxing power* of a State, may be compelled to pay taxes due by its stockholders, to the State, by *way of garnishment*, when the bank *has moneys* in its *possession belonging* to the *shareholders*, such *as profits* or *dividends*, but that when there are no *profits* or *dividends*, in the possession of the corporation *belonging to* the shareholders, the corporation cannot be made to pay the tax out *of its funds*, and *collect* from the *shareholders*, and especially so when the profits and assets are pledged to others by the corporation, and are not under the shareholders' control.

But it may be suggested in answer to the above proposition, that although the distiller, so far as *property owned* by *other persons* in his possession *is concerned*, is *not subject to the State's taxing power in respect of it*, as we have seen by the Court of Appeals' construction of this statute, in conjunction with the 15th Article of the Bill of Rights of Maryland; and although he has no *moneys* in *his hands belonging* to the *owners* of the spirits, out of which he *can pay the tax*, yet, he has the *spirits* of the *owners* in his possession out of which he can *reimburse himself* by executing his lien thereon, and that the principle of the above cases is no answer to this proposition.

In *all* of the cases just above cited, the corporations had full *control of the shares of stock belonging to the individual*

stockholders, which they could either attach to reimburse themselves for the taxes paid, or they could sue the shareholders for the debt, recover judgment, and execute on the shares to satisfy the judgment; and we have a right to assume that if the stock was valuable enough to be taxed it was valuable enough when sold to satisfy the judgment for the amount of the tax; and further, that the Court or counsel for City would have noticed the point in those cases. But *such a procedure* cou'd *not* in any sense *be held a garnishment or attachment by the State* in collection of its taxes, but would simply *be a taking by the State of the corporation's property to satisfy a debt due to the State by the shareholder*, and requiring the corporation to *reimburse itself* by *converting into money* the property of the shareholder. It would not be, in the language of this Court, in Wanzer vs. Truly, *supra;* the State *standing* in the *place* of its *debtor*, and the taking of all that *belongs* to the *debtor* and *nothing more;* but on the contrary, it would be taking something not only *not belonging* to the *debtor*, but *something* the *State* could not *give* to the *debtor* by Statute; since it would be vesting in A. the property of "B.," which can not be done by a State *with* or *without* compensation.

Davidson vs. New Orleans, 96 U. S. 97.

D.

But be that as it may, whether we ca'l the process, by which the distiller *is required* to deliver up to *the State his own funds* to satisfy a *debt* due by the *owners* of the *spirits*, and take in *exchange* therefor *a lien* upon the *debtor's property, garnishment, attachment, appropriation*, or what not, certain it is, that the distil'er is required to deliver up to the State *his own money*, which is not *due to the State from him as taxes*, but *as taxes due to the State from* the *own-*

ers of spirits, in respect of which, a'though *stored* in his warehouse, *all power is denied to the Legislature to tax him*, by the 15th Article of the Bill of Rights; of the Constitution of Maryland; and in return for *his own money*, so paid to the State *on its demand*, he *is forced* to *accept* a mere *lien* on the *property* of the *real* and *only* debtor of the State. Whatever *name* we may give the process by which this is done, certain it is that it is not "due process of law" within the meaning of that term as used in the 14th Amendment of the Constitution of the United States, as construed by this Court. Although it requires no authirity, yet we have the authority of this Court, for the proposition. Davidson vs. New Orleans, 96 U. S. 97:

> "That a statute declaring in terms without more that full and exclusive title to a described piece of land belonging to one person should be and his hereby vested in another person would, if effectual, deprive the former of his property without *due process of law*, within the *meaning* of the Fourteenth Amendment of the Constitution of the United States."

If, then, the Legislature of Maryland had enacted a statute requiring *this defendant* to pay over to *the owners of the spirits* in his possession, the *amount of money due* to *the State by the owner* as taxes, would not this statute, if effectual, *deprive* the distiller of his property *without due process of law*, within the meaning of the Fourteenth Amendment? There can be but an affirmative answer, since the two statutes are the same in principle. But can there possib'y be any difference *in principle* merely because, by the statute here in question, the Legislature *has enacted* that the distiller *shall pay his money to the State* or its agent, rather than to the *owner* of the spirits, the *debtor* of the State?

Has the State any *better right* to take *the money* by force of *its enactment* from the distiller *to itself* any more than to

require him to pay it over to some *third party?* The answer perhaps would be, that in the one case the money is taken for *private use,* and in the other for *public use,* and that while the one is never permitted the other is always lawful. And although in the latter case, since the *custodian* is *not taxed,* COMPENSATION HAS TO BE PAID, that requirement has been fulfilled in the case at bar, in that the distiller is given *a lien* on the *spirits* of the *owner* in his possesion, by the execution of which he can *fully compensate* and reimburse *himself.*

But the fallacy of this last proposition lies in the fact that *money* is taken from the distiller, and merely *a lien* on *distilled spirits* given him in return; which he has to be at the expense of perfecting and executing, and is thus made *to compensate himself.* But even if the State paid the tax to the United States government; and removed the spirits from bond; and delivered the spirits ready for sale to the distiller; still this would not measure up to the *compensation* required to *be given him* by the "due process of law" clause of the Fourteenth Amendment; since under that amendment *money must be paid by the State for private property taken for public use;* and if that property taken is *money, money* in the same amount must be returned, which is the same thing as saying, that the State can take *money* from its citizens *only* by the *exercise* of its *power to tax* them.

Happily we are not without authority on this point.

This Court, in the case of Railroad Co. vs. Chicago, 166 U. S., at page 240, quoting from Cooley on Constitutional Limitations, says:

> "In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally *surround it with safeguards to prevent abuse.* The restraints are, that when specific property is taken a PECUNIARY *compensa-*

tion agreed upon or determined by judicial inquiry *must be* PAID."

See also—Mills, Eminent Domain, Sec. 112, cases cited.

Then, in Navigation Co. vs. U. S., 148 U. S. 326, this Court says:

> "There is no doubt that *'just compensation'* means that the compensation must be a *full* and *perfect* equivalent."

What, may we ask, can be a full and perfect equivalent of *money* except *money*. It is the equivalent in value of all property. If the State by its right of *eminent domain* can take or force the payment of *money* from its citizen and force him to take property, or what is of less value, a *lien* on property as *compensation;* the State can take the valuable real property of the citizen, in the heart of New York City, and give him as compensation acres of wild lands in the mountains of the State; and force him to *compensate himself* in the "*full* and *perfect* equivalent," to wit, money, by the sale of the lands.

Or if the principle of law, upon which the statute, here in question, is based is sound; it lies within the power of the Legislature to provide for the collection of all taxes on real property in Baltimore City, with great convenience and with minimun expense, to the State at least, by enacting that *all owners* of property on the northeast corner of intersecting streets, shall pay all taxes *due* by the *owners* of lots, in their respective blocks, and shall have a lien on the property or lots, for the taxes so paid. The *lien* would be safe, but would the statute be a constitutional exercise of the power of eminent domain, within the meaning of "due process of law" clause of the 14th Amendment of the Constitution of the United States?

But even if it were not true that *money* is the only compensation that will satisfy the "due process" clause of the Four-

teenth Amendment, which in view of the above authorities cannot be doubted, yet there are further objections to this statute under that Amendment; not only because the Legislature has no power or right to fix the compensation, which is a judicial question, Navigation Co. vs. U. S., 148 U. S. 327; but also because the statute requires the distiller to compensate himself, by executing his lien, to the expenses of which are to be added clerk salary, and the like, to keep his tax accounts against the *owners*.

In the case at bar, in addition to the money delivered up to the State for taxes due the State by the owners, which we have seen by the pleadings amounts to about $20,000 for two years only, the distiller, in order to reimburse himself in this amount, must not only be at the further expense of equity proceedings to enforce his lien, but after he obtains the right to sell he must pay to the United States Government (Revised Statutes No.) $45 a barrel for each of the 50,000 barrels before he can procure the whiskey to deliver to the purchasers. He must have the $10,000 ready when the tax is due to pay to the State, and the $225,000 to pay to the United States Government, under its revenue laws, before he can reimburse himself. These amounts are not usually kept in till-drawers for daily use, and therefore must be borrowed at interest, and yet the lien given by the statutes only applies to the amount of tax paid to the State, it does not apply to the expenses incident upon its execution. Further still, in order to make sure that even at the above enormous expense, he will have the spirits or their value in money, when the time comes to execute his lien, he must insure the spirits between the first day of January in each and every year and the day when the tax levy is made, and the taxes are payable; and if any of the spirits are withdrawn by the owners between the first day of January and the day the levy is made, which under the Revenue Laws the owners have a right to do, he has no security for the sum he must pay in taxes when

they fall due, since the lien does not attach until the taxes are paid; but yet he must pay the tax on all spirits in his possession on January 1st in each and every year.

If on the other hand, he waits to execute his lien, when the owner comes to withdraw his spirits, which he can let remain in the warehouse under the Revenue Laws for eight years, the distiller will have paid the taxes on the 50,000 barrels for eight years and will have lost interest on the amount paid. And although by an Act recently passed in the year 1908, a *lien* for interest is allowed the warehouseman and a method provided for executing it, yet it cannot apply to the taxes here sued for, and does not reimburse the warehouseman for the cost of time and labor and other expenses above enumerated.

In this connection this Court in the case of Railroad Co. vs. Chicago, 166 U. S. 238, quoting with approval Mr. Justice Jackson's opinion in the case of Scott vs. Toledo, says:

> "*Whatever* may have been the *power* of the *States* on this subject *prior* to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that since that Amendment went into effect, such limitations and restraints have been placed upon their power of dealing with individual rights, that the States cannot now lawfully *appropriate private property* for *public benefit* or to public uses *without compensation to the owner*, and that any attempt so to do, whether done in pursuance of a *constitutional provision* or legislative *enactment*, whether done by the Legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly *by taking the property of one person and vesting it in another*, or the PUBLIC, or *indidirectly through forms of law, by appropriating the property* AND REQUIRING THE OWNER THEREOF TO COMPENSATE HIMSELF, *or to refund to another* the compen-

sation to which he is entitled, *would* be *wanting* in that *'due process of law' required* by said Amendment.

"The conclusion of this Court on this question is, that since the adoption of the Fourteenth Amendment, *compensation* for *private property* taken for public uses, *constitutes* an *essential element* in due process of law; and without such *compensation* the *appropriation* of private *property* to public uses, no matter under what *form* of *procedure* it *is taken*, would violate the provisions of the Federal Constitution."

It can make no difference, that by this statute, as construed by the Court of Appeals, this defendant must be sued and a judgment obtained before its property is taken, and is therefore as to procedure due process of law; since if by the statute, and the State Court's construction of it, this defendant's *property* or *money* is taken without a *full* and *perfect pecuniary compensation* PAID it by the State or its agent, this Court will ho'd the statute void as to this defendant. This on the authority of this Court in the case of Richard vs. Chicago, 166 U. S. On page 241, speaking for this Court Mr. Justice Harlan says:

"In our opinion, a judgment of a State Court, even if it *be authorized by statute*, whereby private property is taken for the State, or under its direction for public use, without *compensation* made or secured to the owner, is, upon principle and authority, *wanting* in the *due process of law* required by the *Fourteenth Amendment of the Constitution of the United States*, and *the affirmance* of such *judgment* by the *highest Court of the State*, is a *denial by that State* of a right, secured to the owner by *that instrument.*"

In addition to the cases above cited on this branch of this case, are the fol'owing State cases:

In the case of Millet vs. Illinois, 117 Ill. 294, where a State statute requiring coal mine owners to keep scales for the purpose of weighing coal to aid State statistics and to furnish the public with information, was resisted by the mine owners on the ground that it deprived them of their property "without due process of law," the Court said:

> "To compel the purchasing of scales and the employing of a person to use them for the benefit of the public, is to appropriate the private property—that is, the money which this will cost—to the public use, and *therefore it cannot be done* without *due compensation.*"

So in the case of Commonwealth vs. Canal Co., 166 Pa. State, 41, where a statute of the State required all *corporations* and *individuals* owning dams on navigable waters of the State, to alter them so as to allow the free passage of fish, was declared unconstitutional; since the money expended would be for the public benefit and without compensation, and therefore the owners would be deprived of their property without due process of law. At page 50, of the opinion, the Court says:

> "The present law requires the *corporation to make all* of the *changes in the dams* and *keep them* up at *its own expense.* This transcends sovereign power. It is prohibited by the Constitution. The Legislature could as well require a person to build a *church* or a *school house on his own land,* at his own expense."

We submit that we have clearly shown, that not only is it a fact beyond controversy, that this defendant is NOT TAXED and could not have been TAXED by the Legislature, in respect of the spirits, mentioned in the declaration, by the statute here in question, by force of the Constitution of Maryland, as both the statute and the constitution have been construed

by the highest Court of the State; but we have also shown, that on no other principle of law can the statute be sustained, unless it be held to be a constitutional exercise of the State's right of eminent domain; and since we have shown, that by the statute, the State takes the *money* or *property* of the defendant without the *pecuniary* compensation, required by the "due process of law" clause of the 14th Amendment of the Constitution of the United States; the statute is in conflict with that Amendment and therefore void, as to this defendant. Therefore the demurrer to the defendant's 1st and 2nd Pleas, was erroneously sustained, and the judgment thereon should be reversed and a new trial ordered.

ARGUMENT.

Part II.

A.

Bearing in mind that the highest Court of the State of Maryland has decided, that by force of the *limitations* placed, by the Constitution of the State, upon *its power to tax*, the Legislature is *confined* to the imposition of taxes *in personam* on the *owners* of property; and cannot impose *taxes in rem* on *property*, nor *in personam* on the *custodian* of property, *owned* by other persons; and that the statute, here in question, is in strict accord with the above constitutional requirement.

We come now to the question, whether this defendant, *admitted*, by the demurrer to the 2nd plea, not to be the *owner* of the spirits mentioned in the declaration, but the *custodian* of them, can be *forced*, under the provisions of the statute, to

pay to the State, or its agent the plaintiff, the taxes imposed by the statute; when the OWNERS, as is admitted by the demurrer to the 2nd plea, of the spirits, *always have been non-residents* of the *State of Maryland.*

B.

In view of, the *nature* of the *tax* imposed, by the statute, here in question; that the *owners* of the spirits always have been residents of other States, and *non-residents* of the State of Maryland; and even admitting, *for the sake* of the argument, that the defendant is validly made the State's agent or collector; we think it clear from the decisions of this Court, that if the defendant is compelled notwithstanding the above circumstances, to pay the taxes alleged to be due, he will be deprived, of his property without *compensation*, by the State, and therefore without "due process of law" within the meaning of the 14th Amendment of the Constitution of the United States.

Mr. Chief Justice Marshall said in delivering the opinion of this Court in the case of McCulloh vs. Maryland:

> "It is obvious that it (the taxing power) is an incident of sovereignty and is co-extensive with that to which it is incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over *which it does not extend are, upon the soundest principles,* EXEMPT *from* TAXATION."

Therefore a State can *not tax property* IN REM which is not within the State, nor can it tax *a person in personam* who is not within the State. For the first proposition we have this Court as authority, in the case of Louisville Ferry Co. vs. Kentucky, 188 U. S. 385; and for the second proposition, which most concerns us in the case at bar, Dewey vs. Des Moines, 173 U. S. 193.

In 183 U. S., *supra*, this Court says through Mr. Justice Harlan:

> "A franchise granted by the proper authorities of Indiana for maintaining a ferry across the Ohio river from the *Indiana* shore to the Kentucky shore is an Indiana franchise, an incorporeal hereditament derived from and having its legal *situs* for the purpose of taxation in Indiana.
>
> "The fact that such franchise was granted to a Kentucky corporation, which held a Kentucky franchise to carry on the ferry business, from Kentucky shore to the Indiana shore, does not bring the Indiana franchise within the jurisdiction of Kentucky for the purposes of taxation. The taxation of the Indiana franchise by Kentucky would amount to a deprivation of property without due process of law, in violation of the Fourteenth Amendment."

In the case of Dewey vs. Des Moines, 173 U. S., *supra*, where a tax, *in personam* was attempted to be levied against a non-resident of the State, by statute, for which tax his property in the State was subject to execution, by the statute, this Court speaking through Mr. Justice Peckham, at page 203, says:

> "The *jurisdiction to tax* exists *only* in *regard* to *persons* and *property* or upon the business done within the State, and such *jurisdiction* cannot be *enlarged* by reason of *a statute* which *assumes* to make a *non-resident personally liable* to *pay a tax* of the nature of the one in question. All subjects over which the soverign power of the State extends are objects of taxation. The *power to tax* is, however, limited to *persons, property* and *business within the State*, and it cannot reach *the person* of a *non-resident*. A State can no more subject to its power

> a *single person* or a *single article* of property, *whose residence* or legal *situs* is in another State, than it can subject *all* the *citizens* or *all* the *property* of such other State to its power. These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute, imposing a *personal liability* upon a *non-resident* to pay such an assessment as this, *oversteps* the sovereign power of a State."

Once more in the case of State tax on Foreign-held Bonds, 15 Wall. 300, the Court says:

> "The power of taxation of a State is limited to *persons, property* and *business*, within her jurisdiction. All taxation must relate to one of these subjects."

Since we have seen, from the decisions of the highest Court of the State of Maryland, cited *supra* in this brief, the quotations from which we will not repeat here, that the Legislature of the State is limited and confined in levying taxes by the 15th Article of the Declaration of Rights, to taxes *in personam*, on the *owners* of *property*, and can NOT levy a tax, *in rem*, upon the *property owned*, nor upon *this defendant*, and that said Court so held, in construing the very statute here in question; it must follow, that since the *owners* in this case *always have been non-residents* of the State, Maryland was *without jurisdiction* to levy *a tax upon them*, and therefore, there are no taxes *due from them*, to be *collected by*, or *from*, the defendant in this case; for, the defendant, by the express decision of the Court of Appeals (Fowble vs. Kemp, 92 Md., *supra*), is but the agent of the State to collect; and if *no taxes* have been *imposed* upon the *non-resident owners*, per force of the 14th Amendment of the Constitution of the United States, it certainly cannot be said that there are *taxes due* to be collected by the defendant from them.

C.

We have already shown in Part I of this argument under the heading "B," that the principle applied in the case of Corry vs. Baltimore, by this Court, cannot be applied under this statute, since that principle is only applicable to corporations and things created by Act of the States; whereas the statute here in question applies to *individuals* as well as to corporations, and the thing *owned* here by the *non-resident* is not a creature of the State, to the ownership of which conditions have been attached in its creation.

Nor can it be contended, by the plaintiff, that notwithstanding the fact, that the Court of Appeals has decided that this is a tax *in personam*, upon the *owner* and *not* a tax, *in rem* upon the *spirits*, and therefore, under the 14th Amendment of the Constitution of the United States, is *ultra vires*, and void, as to the non-resident *owners*, and could not be collected from them in a personal action, yet, since the spirits are within the State, the State can, by way of *garnishment*, command the distiller to hold them until the tax is paid; or pay the tax due from the owner, and sell them under his lien to reimburse himself, just as a *resident* creditor, of one of the *non-resident owners* would do, to collect the debt due by the non-resident debtor.

Such an argument would ignore the fundamental distinction between an *ordinary debt, due* by *one individual* to *another*, and *taxes* due to the *State* by a *taxpayer*.

That fundamental distinction is, that an ordinary debt due by one individual to another is generally, if not always, the result of a contract between the debtor and creditor, which is enforceable in any jurisdiction where the creditor may be and where there is property belonging to the debtor, provided only, that the laws of the jurisdiction in which he may be afford the remedy of attachment or garnishment. Whereas

taxes due by a citizen to a State are never the result of contract, but are *burdens, charges* or *impositions levied by the State* by virtue of its *sovereignty* for the support of the government, and for all public needs.

Or Judge Cooley puts it in his work on Taxation (2d Ed.):

> "Taxes are *enforced* proportional contributions from persons and property, levied by the State by virtue of its sovereignty, for the support of government and for all public needs."

Or as said by C. J. Dillon, in the case of Hanson vs. Vernon, 27 Iowa, 47:

> "Taxes are burdens or charges *imposed* by the Legislature upon persons or property to raise money for public purposes or to accomplish some govermental end."

Again, C. J. Field says, in the case of Perry vs. Washburn, 20 Cal. 350:

> "A tax is a *charge* upon persons or property to raise money for public purposes."

Once more: In the case of Philadelphia Asso. vs. Wood, the Supreme Court of Pennsylvania said, 39 Pa. St. 82:

> "A tax is an *imposition* for the supply of the public treasury, and not for the supply of individuals or private corporations, however benevolent they may be."

And finally, in 11 Johns. 80, the Court said:

> "The word 'taxes' means *burdens, charges* or *impositions, put on*, or *set upon*, persons or property for public uses."

It is clear there is no contract, or meeting of minds about them, unless it be between the members of the Legislature,

which imposes them. And if the taxes are *in personam*, as here, it is evident, that until they are imposed upon *persons*, there is no legal obligation upon *persons* to pay them. And it follows, as the night the day, if the person is, where the Legislature has no power to impose them, to wit, outside the limits of Legislature's State, even though it attempts to do so, its attempt does not accomplish its object; and hence, there can be no obligation on the person, outside the limits of the State, when the attempt is made, to pay the taxes sought to be imposed.

And the final consequence is, that since there is *no obligation due the State*, there is *nothing to enforce against* the non-residents *property in* the State; for since the property is *not taxed*, the State can have no right against the property, except what would result from the personal obligation of its OWNER; but since none has been imposed on the *non-resident*, there is nothing to enforce against the property; although every *non-resident* holds property in a State subject to the right of the State to levy a *tax in rem*, upon it. But no such tax has been levied by the statute here, and we have seen no tax *in rem* could be levied by force of the State Constitution.

But while a tax *in rem* on a non-resident's property may be collected by giving him notice by publication, it is not possible where the State levies a tax *in personam, as is the case here*, to collect the *nullity*, out of his property in the State, for the simple reason, that there is nothing *due to collect;* while in the case of a tax *in rem* on the property in the State, there is a burden imposed on the property which the State has the right to satisfy out of the property.

Pennoyer vs. Neff, 95 U. S. 714, is an authority for the above proposition, in addition to those already cited, *supra*. In this case the State of Oregon provided for the collection of debts due by non-resident property owners to its citizens. The proceedings did not begin with attachment or seizure of

the property, but provided for a personal judgment against the non-resident. Under such judgment property situate in Oregon was seized and sold. Whether a valid title passed by the sale was then raised by an action of ejectment.

The Supreme Court held that the judgment and seizure were absolutely void even as to local property. The question decided is shown by the following quotation from the opinion, page 727:

> "The want of authority, of tribunals of a State to adjudicate upon obligations of non-residents when they have no property within its limits, is not denied by the Court below, but the position is assumed, that where they have *property within the State, it is immaterial,* whether the *property* is in the first instance brought under the control of the Court, by an attachment or other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner, or such demands be first established in a personal action, and the property of the non-resident be seized and sold for execution."

This Court then held that such a contention was unsound and the judgment wholly void.

Such being the true construction of the Fourteenth Amendment when applied to a case where there was a *legal* and *valid obligation* to start with, how can the right there *asserted* be *even intimated* here, where we have nothing but a *nullity* for our starting point?

Since, it is clear, that the State had no power to impose *the taxes*, on the non-resident *owners*, here in question, it must follow, that there are none due; and that the State has no power to collect its attempted levy, from the non-resident's spirits in the custody of the defendant; and since the State has no power to do so itself, it cannot confer the power on

this defendant to do so; and therefore, it further follows, that since the State has not given the defendant the right or the power to collect anything for her, there is nothing that she can demand from the defendant as her collector, the only relation which the defendant bears to her, as is expressly decided in Fowble vs. Kemp, 92 Md.; and if notwithstanding, the above circumstances the defendant is compelled under the provisions of the statute, here in question, to pay the taxes here sued for, since the State by the statute cannot give the defendant a valid lien against the non-resident *owner's* spirits, nor a valid claim against the *non-resident owners* personally, the defendant will be deprived of its property without *any compensation,* and therefore without "due process of law" within the meaning of the Fourteenth Amendment of the Constitution of the United States.

We therefore, most respectfully submit, that the demurrer to the defendant's 2nd plea was erroneously sustained, and the judgment entered thereon should be reversed and a new trial ordered.

All of which is most respectfully submitted.

SHIRLEY CARTER,
Counsel for Plaintiff in Error.

APPENDIX.

ctions 214 to 224 of Article 81 of Code of Public General Laws of Maryland, 1904.

Distilled Spirits.

214. There shall be levied and collected upon all distilled irits in this State as personal property the same rate of tax- ion which is imposed by the laws of the State on other prop- ty for State and county purposes.

215. For the purpose of such assessment and collection it hereby made the duty of each distiller, and of every owner proprietor of a bonded or other warehouse, in which dis- led spirits are stored and of every person or corporation ving custody of such spirits to make report to the State tax mmissioner on the first day of January in each and every ar of all the distilled spirits on hand at such date, and the x for the ensuing year from the said first of January shall levied and paid on the amount of distilled spirits so in nd, as representing the taxable distilled spirits of such ar; provided, however, that the same distilled spirits shall t be taxed twice for the same year.

216. The said tax commissioner upon receiving said re- rt shall, within thirty days thereafter, due notice of the ne and place having been given by him, grant unto the id distiller, owner, proprietor or custodian a hearing on the estion as to what value shall be placed on the distilled irits so reported, and thereupon, within ten days after such aring, the said tax commissioner shall fix the value of such

distilled spirits for the purpose of taxation under this subtitle, and whenever the spirits are distilled by persons doing business as a corporate body and having shares of capital stock, the valuation by the tax commissioner shall be upon the spirits as personal property without reference to its capital stock, which shall be treated as distinct from said distilled spirits as reported, and such valuation put upon said stock as not to produce double taxation; and the said tax commissioner shall without delay, transmit a copy of said valuation by mail to the appeal tax court of Baltimore city and to the board of county commissioners in the counties where the distilleries are situated, and all distilled spirits upon the valuation and return so made shall be subject to municipal and county taxation, as all other personal property located within the bounds of any county, and the county commissioners of the counties where distilleries are situated and the mayor and city council of Baltimore are directed and required in making their annual levies to impose upon the spirits so returned and valued by the State tax commissioner the State taxes as the same are prescribed by law.

217. Any distiller, owner, proprietor or custodian feeling agrieved at the valuation made by the tax commissioner shall have the right to appeal within the time and in the manner prescribed by section 162.

218. It shall be the duty of the distiller, owner or custodian, as hereinafter indicated and described, to make quarterly reports on the first days of January, April, July and October in each year between the first and fifth days of such months, showing all deliveries during the preceding current quarter, from his custody or care, of any part of the distilled spirits so reported; said delivery report to be made to the tax commissioner of this State, who shall without delay transmit a copy of such report by mail to the appeal tax court

of Baltimore city and to the board of county commissioners of those counties in which distilleries are situate; and said distiller, owner or custodian shall also at the same time he makes a delivery report to the tax commissioner make said report in duplicate to the collector or other proper officers designated by law to receive and collect taxes for the county or city in which such distillery is situate, and shall in each case, along with said report to the collector, make a remittance and payment of the tax upon such distilled spirits which shall be accounted for by said officer as other State and county taxes are accounted for.

[Section 218 applies only to spirits that come into the possession of warehousemen *after* January 1st.—Monticello Case, 90 Md. 416.]

219. No distiller, owner or custodian of such distilled spirits shall permit the same to go from his possession or control without the report and payment of tax hereinbefore provided for, and any person or persons or corporations violating the provisions of this section shall be proceeded against by the proper officer authorized to receive said taxes by distraint for the entire amount of the taxes assessed for the current year, and thereupon all such taxes shall become and be immediately due and collectible by distraint, together with all costs attending the proceedings and a further penalty of five hundred dollars for each such violation.

220. Any person or corporation making any false report or return as to or of the matters herein provided for shall be deemed guilty of a misdemeanor and subject to indictment therefor, and upon indictment and conviction shall be fined not less than one hundred nor more than one thousand dollars for each offense.

221. It shall be the duty of all distillers, warehousemen, and others to exhibit all necessary information on oath if re-

quired, to the appeal tax court of Baltimore city, the several boards of county commissioners in the respective counties where distilleries are situate, and to any authorized officer proceeding to execute a distraint or to collect the tax imposed under this sub-title; and a failure so to do upon demand made shall be deemed a misdemeanor and subject to indictment, and upon indictment and conviction shall subject the offender to a fine of not less than fifty dollars nor more than five hundred dollars.

222. Any warehouseman, custodian or agent paying the tax on distilled spirits herein provided for shall have a lien upon the distilled spirits covered by such tax.

223. The reports and returns required by this sub-title shall as far as possible describe the distilled spirits by name, serial numbers, dates and other convenient identifications.

224. It shall be the duty of the tax commissioner of the State to devise and prescribe such forms and blanks for reports and returns as may be needed or useful for carrying out the provisions of this sub-title.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 75.

HANNIS DISTILLING COMPANY,

Plaintiff in Error,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendant in Error.

In Error to the Circuit Court of the United States for the District of Maryland.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

In support of the following propositions stated by counsel for plaintiff in error in the oral argument in reply to a question from the Bench, I ask leave to submit the following decisions of this Court:

QUESTION.

If the State of Maryland changed its Constitution it would have the undoubted right to accomplish by its *power of tax-*

ation, what the State now does by the Statute. Then how is there any Federal question involved?

PROPOSITIONS STATED BY ME IN REPLY.

Exercising its right or power to tax, the State can take private property without pecuniary compensation, without violating "the due process of law" clause of the Fourteenth Amendment of the Federal Constitution. Exercising its power or right of eminent domain, the State can take private property, but must make compensation *in money;* its failure to make pecuniary compensation under this power, violates the "due process of law" clause of the Fourteenth Amendment of the Federal Constitution.

If, therefore, the State takes private property *without pecuniary compensation*, and says that it does not do so by its *power to tax*, it does so by an unlawful exercise of its power or right of eminent domain and in violation of the "due process of law" clause of the Federal Constitution; and although the custodian would not be deprived of a Federal right, if the same thing was done by the State's *power to tax*, we submit, that it cannot be said, that because the same thing could be done by the *lawful* exercise of one power, that when that thing is done by the *unlawful* exercise of the other power, that the distiller is not deprived of a Federal right, and that there is no Federal question involved.

AUTHORITIES IN SUPPORT OF THE ABOVE PROPOSITIONS.

Home Savings Bank vs. DesMoines, 205 U. S. 503:

> "If a State has not power to levy a tax, it will not be sustained merely because another tax which it might *lawfully* impose would have the same *ultimate incidence*." (Italics ours.)

Owensboro National Bank vs. Owensboro, 173 U. S. 664:

> "The argument that public policy exacts that where there is an equality *in amount* between an *unlawful* tax, and a *lawful* one, the *unlawful* tax should be held valid, does not strike us as worthy of serious consideration." (Italics ours.)

A copy of this has been sent to counsel for defendant in error.

All of which is most respectfully submitted.

SHIRLEY CARTER,
Counsel for Plaintiff in Error.

IN THE

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OCTOBER TERM, 1909.

No. 75.

HANNIS DISTILLING COMPANY,

Plaintiff in Error,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendant in Error.

In Error to the Circuit Court of the United States for the District of Maryland.

BRIEF FOR DEFENDANT IN ERROR.

EDGAR ALLAN POE,
SYLVAN HAYES LAUCHHEIMER,
Attorneys for the Mayor and City Council of Baltimore, Defendant in Error.

King Bros., Printers, 413 E. Lexington Street, Baltimore Md.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This suit was originally instituted in the Court of Common Pleas of Baltimore City on July 6, 1904, and was thereafter removed to the United States Circuit Court for the District of Maryland by the defendant, on the ground that it was incorporated under the laws of West Virginia and a

resident of that State; the order for the removal having been passed on the 10th day of August, 1904 (Record, page 12), and the transcript of the Record being filed on August 15, 1904 (Record, page 1).

The suit was instituted by the Mayor and City Council of Baltimore to recover taxes alleged to be due by the Hannis Distilling Company for distilled spirits stored in its warehouse in the City of Baltimore. The suit was brought in accordance with Chapter 704 of the Acts of the General Assembly of Maryland of 1892, as amended by Chapter 320 of the Acts of the General Assembly of Maryland of 1900, which Acts are now both found codified in sections 214 to 224, inclusive, of Article 81 of the Code of Public General Laws of Maryland of 1904, and which are as follows:

> "Section 214. There shall be levied and collected upon all distilled spirits in this State, as personal property, the same rate of taxation which is imposed by the laws of the State on other property for State and County purposes.
>
> Section 215. For the purpose of such assessment and collection it is hereby made the duty of each distiller, and every owner or proprietor of a bonded or other warehouse in which distilled spirits are stored and of every person or corporation having custody of such spirits to make report to the State Tax Commissioner, on the first day of January in each and every year, of all the distilled spirits on hand at such date, and the tax for the ensuing year from the said first of January shall be levied and paid on the amount of distilled spirits so in hand, as representing the taxable distilled spirits for such year; provided, however, that the same distilled spirits shall not be taxed twice for the same year.
>
> Section 216. The said Tax Commissioner, upon receiving said report, shall, within thirty days thereafter,

due notice of the time and place having been given by him, grant unto the said distiller, owner, proprietor or custodian, a hearing on the question as to what value shall be placed on the distilled spirits so reported, and thereupon, within ten days after such hearing, the said Tax Commissioner shall fix the value of such distilled spirits for the purpose of taxation under this sub-title, and whenever the spirits are distilled by persons doing business as a corporate body and having shares of capital stock, the valuation by the Tax Commissioner shall be upon the spirits as personal property without reference to its capital stock, which shall be treated as distinct from said distilled spirits as reported, and such valuation put upon said stock as not to produce double taxation; and the said Tax Commissioner shall, without delay, transmit a copy of said valuation, by mail, to the Appeal Tax Court of Baltimore City, and to the Board of County Commissioners in the Counties where the distilleries are situated, and all distilled spirits, upon the valuation and return so made, shall be subject to municipal and county taxation, as all other personal property located within the bounds of any county, and the County Commissioners of the Counties where distilleries are situated, and the Mayor and City Council of Baltimore, are directed and required, in making their annual levies, to impose upon the spirits so returned and valued by the State Tax Commissioner the State taxes as the same are prescribed by law.

Section 217. Any distiller, owner, proprietor, or custodian, feeling aggrieved at the valuation made by the Tax Commissioner, shall have the right to appeal within the time and in the manner prescribed by section 162.

Section 218. It shall be the duty of the distiller, owner, or custodian, as hereinafter indicated and described, to make quarterly reports on the first days of

January, April, July and October in each year between the first and fifth days of such months, showing all deliveries during the preceding current quarter from his custody or care, of any part of the distilled spirits so reported; said delivery report to be made to the Tax Commissioner of this State, who shall, without delay, transmit a copy of such report by mail to the Appeal Tax Court of Baltimore City and to the Board of County Commissioners of those counties in which distilleries are situate; and said distiller, owner, or custodian shall also, at the same time he makes a delivery report to the Tax Commissioner, make said report in duplicate to the collector or other proper officers designated by law to receive and collect taxes for the county or city in which such distillery is situate, and shall, in each case, along with said report to the collector, make a remittance and payment of the tax upon such distilled spirits which shall be accounted for by said officer as other State and county taxes are accounted for.

Section 219. No distiller, owner or custodian of such distilled spirits shall permit the same to go from his possession or control without the report and payment of tax hereinbefore provided for, and any person or persons or corporations violating the provisions of this section shall be proceeded against by the proper officer authorized to receive said taxes by distraint for the entire amount of the taxes assessed for the current year, and, thereupon, all such taxes shall become and be immediately due and collectible by distraint, together with all costs attending the proceedings and a further penalty of five hundred dollars for each such violation.

Section 220. Any person or corporation making any false report or return as to or of the matters herein provided for shall be deemed guilty of a misdemeanor and subject to indictment therefor, and upon indictment and

conviction shall be fined not less than one hundred nor more than one thousand dollars for each offense.

Section 221. It shall be the duty of all distillers, warehousemen and others to exhibit all necessary information on oath, if required, to the Appeal Tax Court of Baltimore City, the several boards of County Commissioners in the respective counties where distilleries are situate, and to any authorizd officer proceeding to execute a distraint or to collect the tax imposed under this sub-title; and a failure so to do upon demand made shall be deemed a misdemenaor and subject to indictment, and upon indictment and conviction shall subject the offender to a fine of not less than fifty dollars nor more than five hundred dollars.

Section 222. Any warehouseman, custodian or agent paying the tax on distilled spirits herein provided for shall have a lien upon the distilled spirits covered by such tax.

Section 223. The reports and returns required by this sub-title shall, as far as possible, describe the distilled spirits by name, serial numbers, dates and other convenient identifications.

Section 224. It shall be the duty of the Tax Commissioner of the State to devise and prescribe such forms and blanks for reports and returns as may be needed or useful for carrying out the provisions of this sub-title."

The Hannis Distilling Company interposed the general issue pleas denying liability, but, on the 13th day of June, 1907, secured leave to file two additional pleas (Record, page 13), which pleas are set out on pages 14, 15, 16 and 17 of the Record.

The defendant's first proposition, as embodied in its first additional plea, and stating it most strongly for it, is this:

That since the Court of Appeals of Maryland has held, in construing the above sections of the Code, that the tax therein provided for is not levied either upon the distilled spirits or upon the distiller or warehouseman, but upon the owner of the distilled spirits, and this by virtue of the express provisions of Article 15 of the Bill of Rights of the Constitution of Maryland, by which the otherwise unlimited taxing power of the State is limited and confined to the imposition of taxes, where real or personal property enter into the matter at all, upon the owner of such property, the value of the property merely fixing the measure of the owner's personal liability to the State's taxing power; and that, therefore, the distiller is not only not taxed in this instance if he is not the owner of the distilled spirits, but could not be taxed in respect of it, by virtue of the 15th Article of the Bill of Rights, because he is not the owner of it; that since it has been so held by the Court of Appeals, then it follows that, unless the distiller has funds in his hands belonging to the owners of the whiskey which is stored in his warehouse, out of which he can pay the taxes due by the owners to the State by way of garnishment, the State has not the power nor the right to compel the distiller or warehouseman, who is not the owner of the distilled spirits, to pay out of his own money the taxes due by the owner, and be at the further expense of reimbursing himself by enforcing the lien given him by the State on the distilled spirits of the owner; in that the State, by so doing, would deprive the distiller of his property without compensation or due process of law, and against his rights as secured to him by the Fourteenth Amendment of the Constitution of the United States.

The second proposition, as embodied in the second additional plea, is this:

That since the Court of Appeals of Maryland, in construing the sections of the Code, *supra*, has held that, by virtue of the express provisions of the Fifteenth Article of

the Bill of Rights of the Constitution of Maryland, the tax, by said sections of the Code imposed, is a tax *in personam* upon the owner of the distilled spirits, and not a tax *in rem* upon the distilled spirits, and since the owners are now and always have been, non-residents of the State of Maryland, the State of Maryland had no power, by virtue of the Constitution of the United States, the Fourteenth Amendment thereof, to levy any personal tax whatever upon said non-resident owners, and since no tax has been lawfully levied upon the said owners, no taxes can be lawfully collected from them by the State of Maryland by any process whatever, much less can the State compel the plaintiff in error to pay the supposed taxes out of its own money, without any right whatever against the non-resident owner or his property to reimburse itself.

The City interposed a demurrer to the two additional pleas (Record, pages 17 and 18) and the defendant secured permission to withdraw the general issue pleas previously filed by it, and to stand merely upon the two additional pleas previously referred to (Record, pages 19 and 20). The case was heard on the demurrer to the pleas and the demurrer was sustained (Record, page 20). The defendant declining to proceed further, and electing to stand on its pleas, judgment was rendered against it for the amount found to be due by it (Record, page 21). The defendant, thereupon, sued out a writ of error in order to bring the case to this Court.

The case, therefore, arises from the pleadings, the pleas of the plaintiff in error presenting the question whether, under the Fourteenth Amendment of the Constitution of the United States, the State of Maryland has the right to pass the Act hereinbefore referred to, authorizing the State of Maryland and the City of Baltimore to make the assessment upon which the taxes were levied, which are the basis of this suit.

Argument.

The defendant in error will contend:

I. The matter herein involved is *stare decisis.*

II. The property being concededly within the State of Maryland and the assessment of it having been declared valid by the Court of Appeals of Maryland (the highest Court of the State), no Federal question is involved.

III. The plaintiff in error being a foreign corporation, and having elected to do business in the State of Maryland, is bound to conform to its laws, and will not be heard to complain.

IV. Under the Maryland decisions, which will be followed by this Court, it is competent to treat the *custodian* of property, for purposes of taxation, as the *owner.*

V. Under the decisions of this Court, a State may impose a tax *in personam* against any non-resident in respect of property located within such State, through notice given to a resident agent.

VI. Under the pleadings, this Court will assume that the legal owners of the distilled spirits were non-resident corporations and not non-resident individuals.

I.

The Case is Stare Decisis.

The validity of the Act of 1892, Chapter 704, as amended by Chapter 320 of the Acts of 1900, has been before the Court of Appeals of Maryland three times:

Monticello Distilling Co. vs. Baltimore City, 90 Md. 416;

Fowble vs. Kemp, 92 Md. 632;

Carstairs vs. Cochran, 95 Md. 488;

and, in each case, the right of the State to pass an Act to secure to it and its counties and municipalities taxes upon this species of property was unqualifiedly affirmed. The legislation, therefore, is not in violation of the Constitution of Maryland. The highest Court of the State of Maryland having passed upon the right of the Legislature to enact this species of legislation, this Court will adopt the rulings of the Maryland Court and declare that the legislation is not in violation of the Constitution of Maryland.

Merchants Bank vs. Pennsylvania, 167 U. S. 461.

Backus vs. Fort St. Union Depot Co., 169 U. S. 557-560.

Rasmussen vs. Idaho, 181 U. S. 198-200.

Carstairs vs. Cochran, 193 U. S. 10, 16.

The plaintiff in error admits that so far as the validity of this legislation, as tested by the Maryland Constitution, is concerned, the matter is finally concluded, but it contends that, although this Court has upheld the Maryland Statutes by affirming the case of Carstairs vs. Cochran, 95 Md. 488, in the case of Carstairs vs. Cochran, 193 U. S. 10, 16, the Court did not consider the point now made in this case, but decided the case on points other than the important one intended to be raised by this case, in the two special pleas filed by it.

An inspection of the record and decision in the case of Carstairs vs. Cochran, 193 U. S. 10, 16, will show that this assumption is erroneous, and that this Court fully and finally decided that the statutes involved in this case were authorized both by the Constitution of Maryland and the Constitution of the United States, and that the entry of a judgment for the amount of taxes against the distiller would not deprive him of any rights which he might have under

the Constitution of Maryland or the Constitution of the United States.

The case of Carstairs vs. Cochran, 95 Md. 488, was argued most fully in the Court of Appeals of Maryland, and all points raised in this case were urged in that. Not only was it contended that the statute was in violation of the Maryland Constitution but also of the Federal Constitution. The opinion, starting on page 498 and extending to page 502, considers the validity of the statutes from the standpoint of the Maryland Constitution. The distiller in that case urged that even though the statement of law as announced by Judge Cooley and approved by the Maryland Court of Appeals on pages 503 and 504, and by this Court in 193 U. S., page 16, to the following effect: "Statutes sometimes provide that tangible personal property shall be assessed wherever in the State it may be, either to the owner himself or to the agent or other person having it in charge; and there is no doubt of the right to do this whether the owner is resident of the State or not"—was warrranted by the decisions of many State Courts, it was not justified by, but, on the contrary, was in defiance of, the decisions of the Supreme Court of the United States. This aspect of the case was considered by the Court of Appeals of Maryland, on pages 504 and 505 of its opinion, and the decisions of this Court were reviewed and held not to prevent the assessment which was made in that case. It is, therefore, obvious that the specific point upon which the plaintiff in error now relies, viz, that the owners of the distilled spirits not having been residents of the State of Maryland at the time the assessment and levy were made, the assessment cannot be made against their property existing in the State, and, as the distiller is not the owner of the spirits, and as the Constitution of Maryland provides that the owner, and not the property, is to pay the taxes, the assessment cannot be made against the distiller, was fully considered in the case of Carstairs vs.

Cochran, 95 Md. 488, was dwelt upon in the opinion of the Court of Appeals of Maryland, which was in the record that was before this Court, when it came to consider that case and did finally affirm the decision of the Court of Appeals of Maryland, by the case of Carstairs vs. Cochran, 193 U. S. 10, 16.

It will be seen, therefore, that the point urged below, and which will be strongly urged in this Court, viz., that the Constitution of Maryland requiring the assessment to be to the owners, and the owners in this case being non-residents not within the jurisdiction of Maryland, the assessment in this case is in violation of the Constitution of the United States,—has been fully passed upon by this Court and declared to be of no force. The decision of this Court, in 193 U. S. pages 10, 16, finally disposes of that contention and leaves nothing further to be said thereon, especially in view of the fact that this Court has approved the case of Carstairs vs. Cochran, 193 U. S. 10, 16, in the case of the Scottish Union, etc., Insurance Company vs. Boland, 196 U. S. 620, and expressly affirmed it in the case of Thompson vs. The Commonwealth of Kentucky, 209 U. S. 340, 348, in which case this Court deliberately said:

> "It is within the power of the State to tax spirits in bonded warehouses and require the warehouseman to pay the same, with interest, after the taxes due the United States Government have been paid; and if the warehouseman is given a lien on the spirits for the taxes and interest paid by him, he is not deprived of his property without due process of law" (pages 340, 347, 348).

II.

No Federal Question Involved.

The decisions of this Court in the case of Carstairs vs. Cochran, 193 U. S. 10, 16, and of Thompson vs. The Com-

monwealth of Kentucky, 209 U. S. 340, 348, are, in the opinion of the defendant in error, conclusive of this case, and render unnecessary an extended discussion of other contentions which will be urged by the plaintiff in error. If, however, it were necessary to show that the statute involved in this case was not in violation of the Constitution of the United States, and that a judgment rendered against the plaintiff in error would not take its property without due process of law, such propositions will be found to be supported by the decisions of this Court.

In the case of Nathan vs. Louisiana, 8 How. 73, this Court said:

> "The taxing power of a State is one of its attributes of sovereignty, and, where there has been no compact with the Federal Government or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State which are not properly denominated the means of the general Government, and, as laid down by this Court, it may be exercised at the discretion of the State * * *. Whatever exists within its *territorial limits in the form of property*, real or personal, with the exception stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation and there is no power under the Constitution which can impair this exercise of sovereignty."

In the case of the Union Refrigerator Transit Co. vs. Kentucky, 199 U. S. 194, 204, this Court uses the following language:

> "The power of taxation is exercised upon the assumption of an equivalent rendered in the protection of the property and person of the taxpayer, and if such equivalent cannot possibly be rendered because the property

taxed is *wholly beyond the jurisdiction of the taxing power,* the taxation thereof, within the domicile of the owner, amounts to a taking of property without due process of law."

In the case of The Metropolitan Life Insurance Co. vs. New Orleans, 205 U. S. 395, this Court said:

"The tax was levied in obedience to the law of the State, and the only question here is whether there is anything in the Constitution of the United States which forbids it. The answer to that question depends upon whether the property taxed was within the territorial jurisdiction of the State."

In the case of Coe vs. Errol, 166 U. S. 717, this Court used the following language:

"We take it to be a point settled beyond all contradiction or question that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to, or in use of, the Government of the United States."

In Carstairs vs. Cochran, 193 U. S., page 16, this Court quoted the following, with approval:

"Statutes sometimes provide that tangible personal property shall be assessed wherever in the State it may be, either to the owner himself or to the agent or other person having it in charge; and there is no doubt of the right to do this whether the owner is resident in the State or not."

And in support of this statement the following authorities are given :

Marye vs. Baltimore & Ohio Railroad, 127 U. S. 117, 123.

Pullman Car Company vs. Pennsylvania, 141 U. S. 18.

Ficklin vs. Shelby County, 145 U. S. 122.

Savings Society vs. Multnomah County, 169 U. S. 421, 427.

New Orleans vs. Stempel, 175 U. S. 309.

Board of Assessors vs. Comptoir National Bank, 191 U. S. 388.

National Bank vs. Commonwealth, 9 Wallace, 353.

Merchants' Bank vs. Pennsylvania, 167 U. S. 461.

If, therefore, the cases of Carstairs vs. Cochran, 193 U. S. 10, 16, and Thompson vs. The Commonwealth of Kentucky, 209 U. S. 340, 348, were not conclusive of this matter, the authorities above quoted would make it plain that, so far as the Constitution of the United States is concerned, there has been no violation of the rights conferred by that instrument upon the plaintiff in error, by the assessment and levy made in this case, as the property was concededly within the territorial limits of Maryland (Record, pages 14, 17), and, therefore, subject to the control of the State, and if the assessment and levy were made in accordance with the laws of the State (as is conceded), no right of the plaintiff in error under the Constitution of the United States was violated.

III.

Foreign Corporation has no Standing to Complain.

The plaintiff in error urged below that even if the Act could be upheld against domestic corporations, it was invalid

as against individuals, and, as it appeared from the face of the act that it was intended to apply not only to domestic corporations, but to all individuals, firms and corporations, whether resident or foreign, the Act, therefore, was clearly unconstitutional. The plaintiff in error conceded below that the Act might be constitutional as far as Maryland corporations were concerned; indeed, since the case of Corry vs. the Mayor and City Council of Baltimore, 196 U. S. 466, this concession is unnecessary, as this conclusion would necessarily follow from the decision in that case. As to a non-resident corporation, it would be held that the corporation, having determined to do business within the State after the enactment of this legislation, entered into the State upon the implied condition that it would recognize and abide by this State legislation.

Hammond Packing Co. vs. State of Arkansas, 212 U. S. 322.

Security Mutual Life Insurance Co. vs. Prewitt, 202 U. S. 246, 249.

Fidelity Mut. Life Asso. vs. Mettler, 185 U. S. 308, 326.

The plaintiff in error in this case being a corporation, the question whether or not the Act could be made applicable to individuals cannot help its contention. In the case of The Hammond Packing Company vs. The State of Arkansas, 212 U. S., p. 343, this Court used the following language:

> "Although it be conceded that the provisions of the statute cannot, consistently with constitutional limitations, be applied to individuals, such concession would not cause the act to amount to a denial of the equal protection of the laws. The difference between the extent of the power which the State may exert over the doing of business within the State by an individual, and that which it can exercise as to corporations, furnishes a distinction authorizing a classification between the two. It

is apparent that the Court below treated the statute, in so far as its prohibitions were addressed to individuals, as separable from its requirements as to corporations, and, therefore, even though there was a want of constitutional power to include individuals within the prohibitions of the Act, that fact does not affect the validity of the law as to corporations."

In the case of the New York Central Railroad Company vs. The United States, 212 U. S. 481, this Court (pages 496 and 497) used the following language:

"It is contended that the Elkins Law is unconstitutional in that it applies to individual carriers as well as those of a corporate character, and attributes the act of the agent to all common carriers, thereby making the crime of one person that of another, thus depriving the latter of due process of law and the presumption of innocence which the law raises in his favor. We think the answer to this proposition is obvious; the plaintiff in error is a corporation and the provision as to its responsibility for acts of its agents is specifically stated in the first paragraph of this section. There is no individual in this case complaining of the unconstitutionality of the Act if objectionable on that ground, and the case does not come within that class of cases in which unconstitutional provisions are so interblended with valid ones that the whole Act must fall, notwithstanding its constitutionality is challenged by one who might be legally brought within its provisions."

In the case of Berea College vs. The Commonwealth of Kentucky, 211 U. S. 45, this Court used the following language:

"A State statute limiting the powers of corporations and individuals may be constitutional as to the former, although unconstitutional as to the latter, and, if sepa-

> rable, it will not be held unconstitutional at the instance of a corporation unless it clearly appears that the Legislature would not have enacted it as to corporations separately."

These decisions make it clear that whatever might be the right of an individual, were he assailing the Act, the plaintiff in error has no such right, and that, as far as it is concerned, it, having determined to do business in the State of Maryland, thereby elected to conform to the laws of Maryland, and no question can be raised by it as to the validity of this law.

Although the plaintiff in error will not be heard to object to the terms of the statute, because of alleged discrimination in case of individual distillers, the defendant in error submits that were all the contentions of the plaintiff in error to be given full weight, still there would result no such discrimination as is forbidden by the Fourteenth Amendment to the Constitution of the United States.

The decision in the case of Bell's Gap Railroad Company vs. Pennsylvania, 134 U. S. 233, 237, supports the proposition that the Equal Protection clause of the Fourteenth Amendment is not to be applied as rigidly in the case of taxation statutes as in other cases.

> "The Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all —it may impose different specific taxes for different trades and professions, and may vary the rates of excise upon various products. It may tax real estate and personal property in a different manner. It may tax visible property only and not tax securities for the payment of money.

"Equal proctection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, *or by one which authorizes different modes of assessment for different properties, but retains the same rule of assessment.*"

1 Cooley on taxation, Third Edition, pp. 72-74.
Kentucky R. Tax Cases, 115 U. S. 321.
Pittsburg C. C. & St. L. R. Co. vs. Backus, 154 U. S. 421.
Winona Land Co. vs. Minnesota, 159 U. S. 526.
Weyerhaueser vs. Minn., 176 U. S. 550.

"The equal protection which a corporation can claim is only that accorded to similar associations within the jurisdiction of the State."

1 Cooley on Taxation, Third Edition, p. 81.
Pembina, etc., R. Co. vs. Pa., 125 U. S. 181.

"Nor does a State statute for taxing corporations do prive any person of the equal protection of the laws because it discriminates between property owned by corporations and that owned by natural persons."

1 Cooley on Taxation, Third Edition, pp. 81, 82.
Commonwealth vs. Sharon Coal Co., 164 Pa. St. 284.
Columbus S. R. Co. vs. Wright, 151 U. S. 470.

IV.

Custodian is Assessable in Maryland.

The real contentions of the plaintiff in error are:

1. The Distilled Spirits Act (*supra*, pages 2-5), in so far as it applies to individual distillers or warehousemen, is in violation of the Constitution of the United States, and, therefore, individuals being exempted from the operation of the

Act, corporations are denied the equal protection of the laws guaranteed to them by the Constitution of the United States.

2. Inasmuch as the pleadings show that the owners of the distilled spirits in question are non-residents of the State of Maryland, the State of Maryland is without power to reach the property of non-residents for taxation, although the property is in the State of Maryland.

As to the first proposition, it may be seen, from an inspection of the authorities, that this Court has upheld acts of a similar character whereby individuals have been exempted from their operation. The cases hereinbefore referred to (*supra*, pages 14, 15, 16, 17,) contain the rulings of this Court in reference to this aspect of the case, and make it plain that a corporation cannot complain, even though the act did not apply to individual distillers or warehousemen.

The Act, however, does, and can, apply to individual distillers or warehousemen, and the so-called burdens imposed by the Act are burdens which the individual distiller or warehouseman, if any such there be, must bear. Individuals cannot hold the property of a non-resident, and when called upon to pay their proportionate share of taxes, declare that such property is exempt because of the burdens required to be borne, especially so, when the individuals are presumed to know the law, and can fully protect themselves by contract.

Carstairs vs. Cochran, 193 U. S. 16.

The second contention of the plaintiff in error is so involved with the first one that the two can best be discussed together.

The entire argument of the plaintiff in error proceeds upon false and erroneous premises, to wit :

First. That under the Maryland law property located in the State cannot be assessed to the custodian as distin-

guished from the absolute owner, whether resident or non-resident; and

Second. That no tax can be imposed upon anyone other than the owner of the property.

We find these statements repeated and reiterated throughout the brief. At the same time the plaintiff in error concedes that its entire case depends upon the correctness of these premises. (Brief of Plaintiff in Error, pp. 22, 28.)

It is respectfully submitted that the Court of Appeals of Maryland has not announced the doctrines contended for by the plaintiff in error, but that its decisions, properly interpreted, establish just the contrary

It is true that under the Maryland law taxes are imposed upon persons and not upon things, the things being merely the measure or basis of the assessment. In order, however, to tax a person there must be an assessment against the person, and the Maryland laws are framed, or at least are supposed to be framed, accordingly, though in many instances the language of the statutes would convey quite a different impression.

By referring to Sections 215 and 216 of Article 81 of the Code of Public General Laws of Maryland (fully set forth in this brief, *supra*, pages 2, 3), it will be readily seen that an assessment against the distiller, owner or proprietor of a bonded warehouse, or other custodian of distilled spirits, was intended by the Legislature irrespective of the fact of actual ownership. The object in view was the securing of revenue on account of that class of property by assessing it to one who, whether owner or not, had the custody of, and control over, it and from whom the tax could readily be collected.

If it developed that the distiller, proprietor of the warehouse, or custodian, was also the owner, well and good; if not, then the Act was rendered valid by the giving of the lien upon the property in favor of the party made legally

liable for the payment of the tax to the extent of the tax actually paid.

In each of the three Maryland cases wherein the law was attacked, to wit:

Monticello Distilling Company vs. Mayor and City Council of Baltimore, 90 Md. 416;
Fowble vs. Kemp, 92 Md. 630;
Carstairs vs. Cochran, 95 Md. 488;

the assessment complained of had been made against the distiller, or warehouseman, as being the custodian merely of the property, the party assessed in no one of the cases being the real owner of the goods, and the propriety of the assessment under the circumstances and the liability of the parties actually assessed, for the tax, notwithstanding the fact that the goods assessed to them were not owned by them, were upheld by the Court on the ground that the same were justified by and were in accordance with the 15th Article of the Declaration of Rights of the Constitution of Maryland. Moreover, in Carstairs vs. Cochran, (95 Md. 488, 503-4), the Court, in support of its decision, cited and relied on the following passage from Judge Cooley:

> "Statutes sometimes provide that tangible personal property shall be assessed, wherever in the State it may be, either to the owner himself or to the agent or other person, having it in charge, and there is no doubt of the right to do this whether the owner is resident in the State or not,"

and (on p. 507) the following passage from Commonwealth vs. Gaines, 80 Kentucky, 489:

> "'Was the whiskey rightfully assessed to the appellees, who are not the owners, on the ground alone that they were the possessors of it on January 10, 1880?' and, in answering this question, the Court said: 'The relative rights which may exist between the owner and possessor of the whiskey cannot affect the power of the

> State to authorize its assessment to either of them as the Legislature may deem most prudent and apt to result in securing taxes from them. Indeed convenience and necessity unite in support of the well-established doctrine that the taxing power may impose taxes upon persons or property, and may adopt remedies for their collection which operate against the person of the owner, or the possessor, or the thing taxed, or all of them combined. If this were not the case, non-resident owners, from the proximity of the States, and the commercial rights of all citizens in each, would escape taxation on their movable property produced by our own soil, while it receives the protection of our laws' "—

wherein the right to assess the custodian as distinguished from the non-resident or resident owner of tangible personal property located in the State is distinctly upheld.

Moreover, this Court, in affirming the decision of the Maryland Court of Appeals in Carstairs vs. Cochran, adopted and approved the same language of Judge Cooley as a correct exposition of the law relating to taxation.

It is true that the Maryland Court of Appeals in its opinion did say that taxes were imposed on the owner of things and not on the things themselves, and that, therefore, the tax was upon the owner and not upon the distilled spirits, but it is very evident that the word "owner" was used in the sense of "person," and not in the restricted and literal sense sought now to be given it by the plaintiff in error.

It must be remembered that the law was being assailed, because, literally interpreted, it imposed a tax *in rem* upon the *distilled spirits*, and it was to meet this specific objection that the language, so much relied on by the plaintiff in error, was used. At the same time the Court upheld the right to *assess and tax the custodian who was not the owner*, citing in support thereof the quotations from Judge Cooley and 80 Kentucky above set forth.

The Court was dealing, first with the theory, that underlay the imposition of taxes in Maryland, and secondly, with the practical but legal means of collecting taxes on account of property situated in the State, but owned by non-residents. Theoretically, under the Maryland law it *is* the owner, resident or non-resident, who pays and who is therefore taxed. Because if the tax be not paid, his property is made liable either by seizing it directly, or by allowing the custodian paying the tax to sell it in order to reimburse himself for his outlay.

Although this point is not necessary for the purpose of this case, the defendant in error claims also that the custodian who pays the tax has a personal right of action against the owner, resident or non-resident, for money paid at his request, because the owner being bound to know that the custodian is legally liable for the tax, his request to him to become the custodian and his subsequent failure to supply him with the money with which to pay the tax, will amount in law to an implied promise to repay.

The principle to be fairly deduced from the Carstairs decision in 95th Maryland, is that for the purposes of taxation, and without violating the State Constitution, the *custodian* may be treated as the *owner*.

Article 3, Section 51, of the Maryland Constitution, provides:

> "The personal property of residents of this State shall be subject to taxation in the county or city where the resident *bona fide* resides for the greater part of the year for which the tax may or shall be levied, and not elsewhere, except *goods and chattels permanently located, which shall be taxed in the city or county where they are so located.*"

There is here an explicit recognition of the right to tax goods and chattels *in rem*; and even if, for the purposes of

the argument, it be assumed that this rule was intended to apply only to "residents" of the State (which point cannot be conceded because it implies an artificial and irrational distinction), we think it would be a strained construction not to treat the distiller and custodian as a "resident" of the State, within the meaning of this section.

With the same section in force, the Maryland Court of Appeals has decided that the intangible property held by an executor will be given a constructive taxable *situs* at the place where his letters were granted, though he may actually reside in another county.

Bonaparte vs. State, 63 Md. 465.

And, in a later case, the Court ruled that securities held by a guardian for a ward, both non-residents of the State, were not only subject to taxation in Maryland, but in the county where the guardian was appointed; this on the theory of a constructive situs, apart from the actual residence of the legal owner.

The plaintiff in error has also misinterpreted the meaning and effect of the decision of the Court of Appeals in Fowble vs. Kemp, (*supra*, page 8.)

The contention of the plaintiff in error is that the Court decided in that case that the custodian was not taxed and legally could not be taxed at all under the Distilled Spirits Law. On a careful examination of the case it will clearly appear that the Court reached no such decision.

The Court held that the custodian was personally liable for the tax imposed, but ruled that under the local law of the particular county in question his own property could not be seized until a personal judgment had been rendered against him, in a suit brought to recover the tax due from him on account of the assessment in his name of the property belonging in fact to others.

The decision of the Court merely distinguished between the liabilities, under certain local laws, of the owners of property directly assessed to them and those of a custodian assessed with property not belonging to him, but belonging to others.

In either case the owner and custodian could be sued *in assumpsit*, but in that of the owner, his property could be seized before suit, whereas in that of the custodian, his own property could not be seized until after a judgment had been recovered and execution issued thereon.

The Court, therefore, instead of deciding, as the plaintiff in error claims, that the custodian could not legally be taxed, expressly held that the custodian was in fact taxed, and that a personal judgment could be recovered against him if he failed to pay said tax.

It will be found, upon an examination of section 219, of the Distilled Spirits Act of 1900 (supra p. 4) that the right of distraint against the distiller, is therein expressly given. Fowble vs. Kemp did not involve this section, for as the Court said (92 Md., at page 638):

> "What has been said on this branch of the case has no relation to the right of distress expressly given under sections 5 and 7 of the Act of 1892 (being the same as sections 219 and 221 of the Act of 1900; *supra*, pp. 4 and 5.)

V.

Notice to Agent Sufficient.

If, now, we follow out the theory of the plaintiff in error, and assume that a direct tax cannot be charged against the custodian, but can be imposed only against the legal owner of property, we shall find ample authority to sustain the tax in question in this suit.

It can, without doing violence to the language of the Distilled Spirits Act, be argued that in effect the Act makes the custodian—the distiller—the agent of the owner of the spirits, to receive notice of the assessment and to make returns of the spirits for taxation; and it gives him the right, as such agent, to appeal on behalf of the owner from the valuation fixed by the State Tax Commissioner.

That even a charge *in personam* can be imposed against a non-resident, where notice has been given to a resident agent or representative, is clearly implied by the following ruling of the Supreme Court in Pennoyer vs. Neff, 95 U. S. 714, 735:

> "Neither do we mean to assert that a State may not require a non-resident entering into partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place, where such service may be made and notice given, and provide, upon their failure to make such appointment or to designate such place, that service may be made upon a public officer designated for that purpose, or some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in Vallee vs. Dumergue, 4 Exchequer, 290: 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.' See also The Lafayette Insurance Co. vs. French *et al.*, 18 How. 404, and Gillespie vs. Commercial Mutual Marine Insurance Co., 12 Gray (Mass.) 201."

In view of the accepted principle that revenue statutes are to be construed *liberally* to carry out the purposes of their enactment (U. S. vs. Hodson, 10 Wall. 395), it would be difficult to conceive of any good reason why there should be applied a more rigorous rule in regard to notice in assessment proceedings than is applied to notice in ordinary legal proceedings.

In any event, there is authority for the proposition that if the circumstances are such that an unqualified liability of the non-resident *in personam* (enforceable in or out of the State) will not be imputed, that such liability of the non-resident will nevertheless be sustained to the extent of the property within the jurisdiction of the State.

Cooper vs. Reynolds, 10 Wall. 308.
Picquet vs. Swan, 5 Mass. 35 (Story, J.)
Boswell's Lessee vs. Otis, 9 How. 336.

Whether, under the Distilled Spirits Act, a general right of action exists in favor of the city directly against the owners of the spirits or not, still it would be both possible and feasible for the Court, if necessary, to limit the liability of the distiller to the value of the spirits covered by the assessment. This would meet the argument that it might otherwise be possible to impose a greater liability upon the agent or custodian than he would be able to recoup in the enforcement of his lien; although it is proper here to observe that the existence of such a possibility in those cases where a tax, imposed directly against the agent or custodian upon the property of his principal, has been sustained, has not operated to invalidate such system.

Nor would such construction be in conflict with the Maryland Declaration of Rights (Art. 15), since "every person in the State, or person holding property therein," would still be forced to contribute "his proportion of public taxes for the support of the Government." An assessment or charge *in personam*, with the tax limited to the value of the property

in the State, and, indeed, even a tax wholly *in rem*, would bring about such proportionate contribution as is contemplated by the Declaration of Rights.

BRISTOL VS. WASHINGTON COUNTY.

The defendant in error respectfully contends, moreover, that the Supreme Court of the United States has, by its decision in Bristol vs. Washington County, 177 U. S. 133, effectually disposed of the subtle refinements raised by the plaintiff in error in its effort to avoid this tax. In the case mentioned the Court sustained a liability *in personam* for taxes on personal property, where the person charged was a non-resident of the State, and the assessment was based upon a notice issued to, and a return made by, a resident agent.

The case presented extreme circumstances and went much farther than it is necessary for the Court to go in the case at bar; since the property, in respect of which the assessment was laid, was of an intangible kind, consisting of notes and credits due to and owned by the non-resident, and not even physically located within the State, except at intervals, when returned to the agent for renewal, collection or foreclosure.

In our case the property is a tangible commodity, having an unquestioned physical *situs* within the State at the time as of which the assessment was laid.

Commenting upon the action of the taxpayer in attempting to avoid the Minnesota tax by removing the notes and credits to her home in New York, while retaining her agent in Minnesota, and from time to time sending the notes to such agent for collection or renewal, the Supreme Court says:

> "Persons are not permitted to avail themselves for their own benefit of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design."
>
> Bristol vs. Washington County, 177 U. S. 133, 144.

This case has been cited and approved in:

Metropolitan Life Insurance Company vs. New Orleans, 205 U. S. 395, 398, 402.

Cumnius vs. Reading School District, 198 U. S. 458, 467.

Board of Assessors vs. Comptoir Nationale, 191 U. S. 388, 403.

See also—New Orleans vs. Stempel, 175 U. S. 309, 319, 321, 322.

Savings and Loan Society vs. Multnomah County, 169 U. S. 421, 423, 427, 431.

If a notice to a resident agent in charge of intangible property belonging to a non-resident owner, is a sufficient basis to create a liability *in personam* against the non-resident owner for taxes in respect of the property held by such agent, why, we ask, should it not be competent for the State of Maryland to constitute the custodian of distilled spirits the agent of the owner—whether the latter be resident or non-resident, corporation or individual—to make return of the spirits for the purposes of State and local taxation?

VI.

The Owners Are Not Individuals.

Finally, the reasons urged by the plaintiff in error against the validity of the tax on spirits owned by non resident *individuals*, do not apply to the spirits of resident individuals, Maryland corporations or *foreign corporations*. No reason has been advanced against the right of the State to designate the custodian of personal property as the agent of a *foreign corporation*, to receive notice and make return on behalf of such owner, of spirits or other property, under the control of such custodian and subject to taxation.

Now, it will be observed that the second plea of the plaintiff in error, to which a demurrer has been interposed, avers simply that the owners of the distilled spirits covered by the assessments in dispute "always have been, and now are, non-residents of the State of Maryland." There is no allegation that they are *individuals; non constat*, these owners, like the custodian, are themselves foreign corporations. The Court is justified—and indeed compelled—to draw inferences most strongly against the pleader. Whether the Hannis Distilling Company itself knows, or can ascertain the identity of the holders of the warehouse certificates issued against the spirits in question, is problematical. In Monticello Co. vs. Baltimore, 90 Md. 416, 424, it was said that the evidence of ownership of the distilled spirits in bonded warehouses consists of certificates issued by the distilling company. "These warehouse certificates pass by delivery, and after they leave the possession of the warehouseman or the distiller, he can with difficulty, if he can at all, keep trace of them."

There being no allegation that the spirits were owned by non-resident *individuals*, the question whether or not such ownership would vitiate the tax as to them (and, *a fortiori* whether it would strike down the whole law and emasculate the entire Maryland system of taxation of the property of non-residents, which has stood for over a century), is a purely academic inquiry.

If the contention of the plaintiff in error be sound, then the State, Counties and Cities of Maryland have no power to tax any property, real or personal, belonging to non-residents.

The statement of this proposition furnishes its own answer.

The Fifteenth Article of the Declaration of Rights of Maryland is as follows:

> "That the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; that paupers

ought not be assessed for the support of the Government; but every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the Government, according to his actual worth in real or personal property; yet fines, duties or taxes may properly and justly be imposed or laid with a political view for the good government and benefit of the community."

The Declaration of Rights of Maryland, therefore, contemplates the taxation of all property within the State, and, if the owner is within the State, then the assessment is made to him, and the measure of the assessment is the value of the property; but where property, permanently located in the State, belongs to a non-resident of the State, then the correct construction of the Declaration of Rights does not require that property which receives all the benefits paid for by taxation should escape taxation, but on the contrary, in such case, the owner thereof must contribute his portion towards the taxes of the State, measured by the value of his property located permanently within the State.

It is, therefore, submitted that the judgement of the United States Circuit Court for the District of Maryland should be affirmed.

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Attorneys for the Mayor and City Council of Baltimore, Defendant in Error.

12.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 75.

HARRIS DISTILLING COMPANY,

Plaintiff in Error,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendant in Error.

In Error to the Circuit Court of the United States for the District of Maryland.

Supplement to Brief for Plaintiff in Error.

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I.

Having pointed out to this Court in our original Brief filed in this case that the decision of this Court in the case of Carstairs vs. Cochran, 193 U. S. 10, 16, is in *direct conflict* with the decisions of the highest Court of Maryland as to the

limitations placed by the Constitution of the State upon the *power* of the Legislature *to tax*, in Maryland, and as to the *objects of that taxing power;* and having shown that this *conflict* of decision must have resulted from the fact that the *singular limitations* placed by the Constitution of the State, upon the Legislature's power to tax, were not brought to the attention of this Court, in the presentation of the Carstairs Case; and that therefore this Court *assumed*, that the Maryland Legislature's *power to tax was that broad power* possessed by the Legislatures of all other States of the Union, and therefore *extended to persons and property; mere possessors or custodians* of property, as well as *owners*, or those having the *legal* title to property; and having shown, that the *conflict* of decision above mentioned must have resulted from the above *cause*, by bringing to this Court's attention its decision in the case of Corry vs. Baltimore, 196 U. S. 466, in which case the *singular limitations* on the Legislature's *power to tax were brought* to the attention of this Court; and where but for these *singular limitations*, the principles *applied* by this Court in the Carstairs Case would have been *applicable*, and would have been a *flat answer to the contentions* of Corry, this Court *applied another principle*, and, we submit, the only one that could have been applied, *consistent* with the construction placed upon the Constitution of Maryland, by its highest Court, with respect to the *limitations* placed by that instrument on the Legislature's *power to tax;* and having shown that the constitutional questions raised in this case, were neither raised nor decided by this Court, in Carstairs vs. Cochran. Having fully treated the above subjects in our original Brief for the Plaintiff in Error, filed in this case, we pass over that portion of the defendant in error's brief from pages 8 to 14, which asserts, that the decision of this Court in Carstairs vs. Cochran and *other* decisions of this Court *applying the same principles* as those applied in the Carstairs Case, are conclusive upon the questions raised in the case at bar.

II.

On pages 39 to 41, of plaintiff in error's original Brief, we advanced the argument that the constitutionality of the statute, here in question, could not be sustained *even as to domestic corporations* by the application of the principle, that the State, the *creator of its own corporations*, could put what burdens it might see fit upon its *own creatures*. For the reason, that the statute by its terms includes *persons* as well as corporations; and that since the above principle, in its *very nature*, is only applicable to corporations, we could not *reasonably infer* that the Legislature intended to apply that principle to a statue in which natural persons were included in the object of the law. And therefore since there is nothing in the history of the statute, or in the statute itself, or its object, from which this Court can gather the *intention* of the Legislature, that the statute should apply to corporations if it could not be sustained as to *persons;* and since the highest Court of Maryland has held it applicable to both *persons* and *corporations on the same principle*, which could not be the "*creator over creature*" principle, we conclude on the authority of this Court *cited*, that the statute could not be held to be *separable, and sustainable*, on any principle applicable to *corporations* alone, and not applicable to *persons;* and therefore even if the State had the same jurisdiction over the defendant, *a foreign corporation*, as over its *own corporations*, the statute *could not be sustained* against the plaintiff in error on the "creator over creature" principle, but *only, if at all*, on the ground that the statute is a lawful exercise by the Maryland Legislature of the State's power or right of eminent domain as measured by the Fourteenth Amendment of the Constitution of the United States; and we have shown that the statute is in conflict with that amendment.

III.

In addition to the above argument, that the statute could not be held *separable* by this Court, we advanced the proposition, that even if this Court should hold it to be *separable*, and therefore sustainable as to *domestic corporations* on the principle of "creator over cerature," and if the State had the same power over the plaintiff in error, *a foreign corporation*, sustainable as to it; that even under those conditions the statute would still be unconstitutional under the Fourteenth Amendment, since *persons and partnerships* own distilleries and bonded warehouses in the State, under the same conditions and circumstances in all respects as corporations, and are equally in all respects within the object of the statute here in question, and therefore if the statute was made to apply to corporations alone, it would deny them "the equal protection of the law" on the authority of this Court.

Railroad Co. vs. Ellis, 165 U. S. 150.

In answer to the above argument of the plaintiff in error, that the statute cannot be held *separable* by this Court; and, therefore, cannot be sustained even as to *domestic corporations* on the "creator over creature" principle; and cannot be sustained, therefore, on *that principle as to foreign corporations*, even if the State had the *same power* over the latter as over the former; the defendant in error states two propositions (Defendant in Error's Brief, page 15), both of which it contends are supported by the decisions of this Court cited, to wit: 1st. That the statute here in question is *separable;* and 2nd. That the plaintiff in error, *a foreign corporation*, having determined to do business in the State after the enactment of the statute, entered into the State upon the *implied condition* that it would recognize and abide by this statute.

A.

In support of the first proposition the defendant in error cites and quotes from the following:

Hammond Packing Co. vs. Arkansas, 212 U. S., at page 343.

New York Central R. R. Co. vs. The United States, 212 U. S. 481, at pages 496 and 497.

Berea College vs. Kentucky, 211 U. S. 45.

In order not to extend this Supplementary Brief to any further length than necessary, we will state, in substance, the grounds of the decisions of this Court in the above cases, holding the statutes *separable*.

In the Hammond Co. Case, this Court held the statute *separable, primarily* because the State Court had so construed it; and the *State Court had held it separable*, because the political history of the statute *showed clearly* that the statute had been passed with the *declared and express object in view* of making its provisions applicable to *foreign corporations*, which were subject to the *same control* in Arkansas by its admission laws as domestic corporations.

This Court saying, through Mr. Justice White, at page 344 of 212 U. S.:

> "It is apparent that the *Court below*, both in the Hartford Case and in this, by a *construction which is* HERE *binding*, treated the statute, in so far as its prohibitions were addressed to individuals, as *separable* from its requirements as to corporations."

And the State Court, in giving its reasons for holding the statute separable, which reasons are quoted by this Court at page 333, said:

> "In 1904 the dominant political party in this State, through its platform, demanded of the next General As-

> sembly the passage of the King bill, and of the purpose of said bill said: 'Whereby all *foreign corporations* shall be prevented from doing business in this State if they are members of any trust, etc.' The General Assembly elected in 1904, composed almost entirely of members of the political party whose platform is quoted, with remarkable *unanimity and rapidity*, passed the King bill, and in less than a fortnight of its organization it was approved, and it is the statute at bar."

Then the Court said:

> "That the General Assembly intended by this Act to subject to the penalty of it any *foreign corporation*, doing business in this State, while a member of a trust formed to fix prices anywhere."

In New York Central R. R. Co. Case, this Court held the act *separable*, because its parts were *separable* in themselves, the *first section*, which applied to *corporation common carriers alone, being sufficient in itself* to cover the case then up for decision; and therefore the provisions were not so interblended that the striking down of one would carry the remainder. This Court, through Mr. Justice Day, saying at page 496:

> "The plaintiff in error is a corporation, and the provision as to its responsibility for acts of its agents is *specifically* stated in the first paragraph of the section. * * * It *may be doubted* whether there are *any individual carriers engaged in* interstate commerce. * * * There can be *no question that Congress would have applied these provisions to corporation carriers, whether individuals were included or not.*"

In the Berea College Case, this Court again followed the decision of the State Court, holding the statute *saparable*,

and, since, as *separable* and applicable to corporations, it was not unconstitutional, the State Court's judgment was affirmed.

In the Hammond Packing Co. Case and in the Berea College Case, this Court held the statutes, in question, *separable as to corporations and persons, because the State Courts had so held;* and these decisions were binding, of course, on this Court, there being no constitutional objection to them so far as the Constitution of the United States was concerned, after they had been held *separable* by the State Courts; and the State Courts held them *separable* because from the history of the statutes and otherwise the Courts *could see and declare* that it was the *intention* of the Legislature that they should be enforced as to *corporations* if they could not be enforced as to *persons.*

In the New York Central Railroad Co. Case, the *intention* of Congress that the law should be enforced against *corporations* if it could not be against *persons*, was apparent from the Act itself, by the placing of *corporations* in the first section of the Act, which section was complete in itself, and from the further fact that it would be hard to find an *individual or person* a common carrier engaged in interstate commerce.

We fail to see, therefore, how the above cases bear on the contention, of the defendant in error, that the statute at bar should be declared *separable* as between *corporations and persons* by this Court, since not only do all the provisions of the statute apply equally to *corporations and persons*, but the highest Court of Maryland, in construing this statute, has held that it applies in all its terms both to *domestic corporations and individuals*, and upon the same principle; as to *domestic corporations*, in the Monticello Case, 90 Md. 427; and as to *persons or individuals*, in the Carstairs Case, 95 Md. 488; *and in the latter case it was pressed upon the Court, that while the statute might be constitutional as to* DOMESTIC CORPORATIONS, it was invalid as to *persons*, in that the State's

power over the *former* was greater than over the *latter;* but the State Court made no distinction between the two so far as the applicability of the provisions of the statute was concerned.

In view of this construction, by the highest Court of Maryland, on the point now in question, we do not think this Court will hold that the statute is *separable,* or that it was the intention of the Legislature that it should be held *separable,* or enforced against corporations on any principle that is not as applicable to *persons as to corporations,* since the highest Court of Maryland has held flatly to the contrary in the Carstairs Case.

B.

Putting out of view, for the moment, the answer of the defendant in error to the argument of the plaintiff in error, that even if this statute is *separable,* that it is *still* unconstitutional as denying to *domestic corporations* "the equal protection of the laws"; we maintain, that whether this statute is *separable,* and therefore *valid as to domestic* corporations on the "creator over creature" principle, or whether, if applicable to *domestic corporations* alone, it does not deny them "the equal protection of the laws," *are questions,* which even though solved *adversely to the domestic corporations* of Maryland, can in no way alter the contention of the plaintiff in error, a *foreign corporation,* that the statute, if enforced as to it, "deprives it of its property without due process of law," and is therefore in conflict with the Fourteenth Amendment of the Constitution of the United States, and cannot be enforced against this plaintiff in error.

In maintaining the above proposition, by the decisions of this Court, we answer the assertion of the defendant in error, referred to *supra, to wit,* that the plaintiff in error hav-

ing determined to do business in the State of Maryland after the enactment of this statute, entered into the State upon the *implied condition* that it would recognize and abide by this State legislation." The defendant in error thus recognizing that only by its *agreement* so to do could the plaintiff in error be bound to comply with the statute.

STATUTE CANNOT BE ENFORCED AS TO PLAINTIFF IN ERROR, A FOREIGN CORPORATION, EVEN IF ENFORCEABLE AS TO DOMESTIC CORPORATIONS.

C.

We admit at the outset that all laws of the State of Maryland which do not impose a *personal obligation* upon the plaintiff in error, a *foreign corporation*, and which are constitutional as applied to the plaintiff in error when tested by the Constitution of the United States, the plaintiff in error is bound by, with or without its *agreement* so to be bound. But we will maintain the following propositions:

(*a*) *That the plaintiff in error, a* FOREIGN CORPORATION, CANNOT *be* COMPELLED *to obey any law of the State of Maryland imposing a* PERSONAL OBLIGATION *which it has* NOT CONTRACTED TO OBEY, *even though constitutional as applied to residents of the State,* CORPORATIONS *and* INDIVIDUALS.

(*b*) *That the plaintiff in error, a* FOREIGN CORPORATION, *cannot* BE COMPELLED *to* OBEY *a law of the State of Maryland* IMPOSING *a* PERSONAL OBLIGATION, *such as the* STATUTE *at* BAR (which we have shown to be *unconstitutional as to resident individuals or persons, and can* ONLY BE SUSTAINED *as to* DOMESTIC CORPORATIONS *on the* "CREATOR OVER CREATURE" principle), whether the *plaintiff in error has* EXPRESS-

LY *or* IMPLIEDLY CONTRACTED *to obey the statute at the time it obtained the State's permission to do business in the State.*

Since the foundation of both of the above propositions is the *fact* that the plaintiff in error is a *non-resident* of the State of Maryland, and *not subject to its jurisdiction* PERSONALLY; and that therefore *its relation to the State of Maryland*, so far as *personal obligations* are concerned, is *wholly contractual*, and not that of a *subject to a sovereign*, we will first establish that *essential fact* by the authority of this Court, and then cite the decisions of this Court sustaining the two propositions above stated.

In the case of Runyan vs. Lessee of Coster *et al.*, 14 Peters, 129, this Court said:

> "A *corporation can have no legal existence* out of the *sovereignty by which it was created; as it exists* only in *contemplation* of law, and by *force of the law;* and that where that *law ceases to operate*, and is no longer *obligatory*, the corporation can have *no existence. It must dwell in the place of its creation and cannot* MIGRATE *to another sovereignty.* But although it *must live* and have its being in the State only, yet it does not follow that its *existence* THERE will not be RECOGNIZED *in other places;* and its *residence* in one State creates no insuperable objection to its power of *contracting* in another. As in the case of a *natural person, it is* NOT NECESSARY *that it should actually exist in the sovereignty in which the contract is made.* It is sufficient that its *existence as an artificial person* IN THE STATE *of its* CREATION *is acknowledged and* RECOGNIZED *by the State or nation where the dealing takes place;* and that it is permitted by the law of that place to exercise there the powers with which it is endowed."

Since it is admitted, in this case, by the demurrer to the pleas, that the plaintiff in error is a corporation of the State of West Virginia, and a *citizen and resident of the State of West Virginia, and not a citizen nor a resident of the State of Maryland,* it could not be said that it is a *resident of the State of Maryland* and subject to its *jurisdiction;* but the above authority of this Court establishes the *fact* beyond all controversy; and it is clear from the above decision that the plaintiff in error could *never have been anything but a resident* of West Virginia and a *non-resident* of Maryland. And since the plaintiff in error, the *legal entity, exists only* in West Virginia, no law that *Maryland has enacted, or can enact, can reach the artificial person* in West Virginia, *by force of its enactment;* for Maryland laws, like West Virginia's law creating the plaintiff in error, can have no *existence or force* beyond the limits of the State of Maryland.

From the above it further follows, that although the Legislature of Maryland, in *creating its own corporations,* or in the exercise of its right to *amend, alter or repeal* the laws creating its *own corporations,* might impose upon them the *personal obligation* of the statute here complained of, on the principle that, the *creator has the undoubted right to place what conditions it may see fit upon its creatures, and the conditions* so imposed become as much a part of *their being,* as the part of the law which brings them *into existence;* yet the Legislature of Maryland did not *enact, and cannot amend, the law of West Virginia which created and sustains the defendant's being;* and no law of Maryland is *obligatory on the defendant personally* per force of its enactment.

Therefore, while *domestic corporations* of Maryland, if the statute is *separable, and as separable,* does not deprive them of the "equal protection of the laws," might be bound to comply with the statute here in question, because they are the *creatures* of the State, *within* the *State,* and subject to its *jurisdiction;* yet, since the defendant is a *non-resident* of the

State of Maryland, and since the statute imposes the burden *if at all*, upon the legal *entity* in West Virginia, *personally;* and since the statute can have no *extra-territorial* effect, the defendant cannot be compelled to comply with the statute unless it has *agreed or contracted* so to do. In short, it must be made out that the plaintiff in error, a citizen and a *resident* of West Virginia, and a *non-resident* of Maryland, has *agreed or contracted* with the State of Maryland: 1st, to draw from its *personal treasury in West Virginia* its *own money and pay the same to the defendant in error in Maryland*, in payment of *taxes*, "not due at all by the plaintiff in error," upon whom the taxes have not been imposed and who is "not a *taxpayer*" (Kemp Case, 92 Md. 638), but due, *if at all*, PERSONALLY *by non-resident owners*, of property in Maryland; 2nd, *to reimburse itself* by executing a lien, which Maryland has no rght to give as to property of *non-resident owners, on non-taxable and non-taxed property in Maryland;* and 3rd, on its failure to pay its *own money* to the plaintiff under the above circumstances, it has agreed and contracted that the plaintiff may bring suit against it in Maryland, recover a *personal judgment* against it and execute on its property to pay the taxes, not due by it, by the Constitution of the State and the tax statute, as construed by its highest Court, and not due by the *non-resident owners*, of the spirits in the State, by force of the Fourteenth Amendment to the Federal Constitution; and which have not been imposed upon the spirits *in rem*, as decided by Maryland's highest Court.

The defendant in error asserts that the plaintiff in error *impliedly contracted* to do all the above things when it began to do business in the State of Maryland.

Putting out of view, for the moment, the *constitutionality vel non* of the statute, has the plaintiff in error so *contracted?*

The answer to this question brings us to the authorities of this Court, which will be cited to sustain the first proposition, *"a," supra*, of the plaintiff in error.

a.

The case of New York, Lake Erie, etc., R. Co. vs. Pennsylvania, 153 U. S. 629, is an authority for the plaintiff in error's first proposition, *supra*, to wit, "that the plaintiff in error is only bound to obey such laws of Maryland imposing a *personal obligation* as it has *contracted* to obey."

The facts of the above case are briefly and in substance these:

The Railroad Company, a corporation of the State of New York, desired to build a part of its road, which began in the State of New York, in and through a part of the State of Pennsylvania, and applied for the right so to do to the State of Pennsylvania. Pennsylvania, by an act of its Legislature, granted the right, upon the conditions that after the road should be completed, the Railroad Company should pay to the State annually the sum of $10,000, and that the stock of the road should be subject to taxation in Pennsylvania to an amount equal to the construction of so much of the road as was in that State. The road was completed and the Railroad Company complied with the terms of its grant. Pennsylvania then passed a law taxing bonds, etc., in the hands of individual citizens of the State of Pennsylvania, and required each private corporation incorporated under the laws of any other State and doing business in Pennsylvania, when making payment of interest upon its bonds held by residents of Pennsylvania to collect the tax and pay the money into the State Treasury of Pennsylvania, and by the law the corporation was required to report to the State of Pennsylvania the amount of bonds, etc., held by residents of the State of Pennsylvania. The Railroad Company made this report, giving the amount of all its outstanding obligations, but not specifying how much was owned by residents of Pennsylvania. The Railroad Co. declined to further comply with the law, and suit was instituted by Pennsylvania against the Railroad

Co. in the State Court of Pennsylvania to recover the taxes due by the *owners* in the State of its bonds, etc. At the trial, in the lower Court, it was disclosed by certain lists kept by the Railroad Co., that residents of Pennsylvania owned about $841,000 of the bonds, etc., and judgment was entered for the taxes due on this amount against the Railroad Co. This judgment was affirmed by the Supreme Court of Pennsylvania, and then the case was brought here on a writ of error; the Railroad Co. contending that the statute, if applied to it in respect to taxes due and payable in Pennsylvania by residents of that State, was repugnant to the Constitution of the United States.

This Court held, that since the personal duty imposed by the Act, making it a *collector or garnishee* of taxes due to the State by residents of Pennsylvania, was an additional personal duty to those stipulated in the Act granting it the right to do business in the State, that the Act impaired the obligation of the contract between the Railroad Company and the State; which was founded on a *valuable consideration* passing from the Company to the State. And, further, that the personal duty imposed, although obligatory upon *domestic corporations* included in the Act, if not prevented by contract, was one which the State had no right to impose upon the Railroad Co., *a foreign corporation, and a non-resident of the State.*

And this Court so held, notwithstanding the contention of the State, that the Act in *terms applied to foreign corporations;* and the Railroad Co. *continued* to do business in the State *after* its enactment; and since the Act was *reasonable* in itself and did not tax or take away property of the Railroad Co.; but merely required it to pay to the State as *garnishee* money in its hands *belonging to residents* of Pennsylvania and *legally due* by them to the State; it was therefore but a reasonable regulation, the right to impose which the State is not presumed to have bartered away.

It has been noted by this Court that the only duty imposed by the Act, in question in the above case, was the duty of a *garnishee,* of paying over *money in its hands belonging to debtors* of the State to the State, which would have been valid, as said by this Court, but for the *facts:* 1st, that the *non-resident had not agreed* to perform the duty by its *contract* with the State covering its right to do business in the State; and therefore its enforcement would impair the obligation of that contract, even though the Act applied in *terms to foreign corporations* and it had *continued* to do business in the State *after its enactment;* and 2nd, even putting out of view the contract, the Act imposed a personal duty on a *non-resident,* which no law of the State of Pennsylvania could reach, since beyond its territory.

In the case at bar the only conditions placed upon the plaintiff in error's right to do business in the State of Maryland, for a *valuable consideration* passing from the plaintiff in error to the State, are those prescribed by sections 137 to 141 of Art. 23 of the Code of Public General Laws of Maryland, now contained in the Code of 1904, which provide, in substance, that the business desired to be done shall be such as domestic corporations are permitted to do; and then it is required to file a certified copy of its charter and give certain information as to the amount of its stock, its debts, etc.; to designate an agent upon whom process issuing out of the Courts of the State may be served, and pay to the State $25.00, and after complying with the above conditions, it receives a certificate certifying that it is entitled to do business in the State. No *personal obligations* other than the above were imposed by the statute authorizing the plaintiff in error to do business in the State for the valuable consideration paid to the State; it was not required to stipulate to be bound by any laws of the State imposing *personal obligations,* such as the statute here in question or any other.

Therefore, having performed all that it was required to do by the State, and having continued to perform all that it was required to perform *personally*, in order to obtain the right to do business in the State, it cannot now be required by the State to perform an additional *personal duty not named or referred to* in the *contract* made with the State when it obtained the right, for a *valuable consideration*, to do business in the State. And that this statute may have been in force when it applied for the right to do business, which does not appear from the Record, cannot alter the case, any more than in the case above cited—the Railroad Co. *continued* to do business *after* the enactment of the law, struck down as to it in that case. Not only because the *personal duty* which could only be *assumed by agreement, was not named or referred to in the contract dealing with other personal duties*, but the statute itself does not contain the term "*foreign corporations*," as did the Pennsylvania statute; and since it is only constitutionally sustainable on a principle *peculiar to domestic corporations*, and contains no language as to *the performance of its personal duties, being a condition* to the doing of business by a *foreign corporation* in the State; it cannot be said that the plaintiff in error, by *beginning or continuing* to do business in the State after its enactment, *impliedly agreed* with the State to perform the *personal duty* imposed by the statute; and especially so since the statute, unlike that of Pennsylvania, requires the plaintiff in error, a *non-resident*, to pay its *own personal money* to Maryland, to satisfy a debt due, *if at all, by other persons*, and to take the risk and expense of reimbursing itself as to *resident owners* of spirits, and without any right or hope of reimbursement as to *non-resident owners* of spirits in Maryland.

We feel confident, therefore, that on the authority above cited of this Court, we have established our first proposition, *supra;* and that the enforcement of this statute against the plaintiff in error "impairs the obligation of the contract made

by the State with the plaintiff in error;" and is therefore unconstitutional; and deprives the plaintiff in error of its property "without due process of law,' contrary to the Fourteenth Amendment, since it takes the plaintiff in error's property to satisfy an alleged *personal obligation of non-residents* of Maryland which it *has not imposed, and could not impose.*

b.

We come now to the second proposition, *supra*, that since we have shown the statute to be *unconstitutional*, except as to *domestic corporations on the "creator over creature"* principle, it cannot be *enforced* against the plaintiff in error, notwithstanding it should be held that it *expressly or impliedly* agreed to obey its provisions.

In the case of Bacon vs. Burnside, 121 U. S. 186, at page 200, Mr. Justice Blatchford, speaking for this Court, said:

> "In all the cases in which this Court has considered the subject of the granting by a State to a *foreign corporation* of its consent to the transaction of business in the State, it has uniformly asserted that *no conditions* can be *imposed* by the State which are repugnant to the Constitution and laws of the United States."

And this Court then refers to its decisions, and, among others, to the case of Ins. Co. vs. Morse, 20 Wall. 445. In this latter case the plaintiff in error had entered into an *express written agreement* with the State of Wisconsin, as a *condition precedent* to its doing business in the State, required by the law of Wisconsin, that if it should be sued in the State Courts it would forego its constitutional right, secured to it by the Federal Constitution, to remove the case to the Federal Courts. A suit was brough against it, in the State Court, by Morse, and the Insurance Company filed the

necessary petition for the removal of the case to the Federal Court. The *agreement* between the Insurance Company and the State, made in pursance to the State statute, was enforced by the State Court, and the Federal constitutional right denied; and this ruling and the judgment of the lower Court was affirmed by the Supreme Court of the State. On writ of error, from this Court, the judgment was reviewed and reversed, and this Court held:

> "That the statute of Wisconsin is an obstruction to the right of removal of cases to the Federal Courts; is repugnant to the Constitution of the United States, and the laws in pursuance thereof, and is illegal and void; and the *agreement* of the Insurance Company derives no support from an unconstitutional statute and *is void, as it would be had* no such statute *been passed.*"

In short, this Court held that a statute of a State, depriving a *foreign corporation* of a right secured to it by the Federal Constitution, could *not be enforced* against it, notwithstanding the *foreign corporation had expressly agreed to be bound by it.*

Although the above cases have to do only with the constitutional right of removal of cases to the Federal Courts, yet the ground of the decisions is, that an unconstitutional statute, or a satute denying or depriving a *foreign corporation* of a constitutional right, is *void, and unenforceable*, and cannot be rendered *valid and enforceable by agreement.* Therefore, we submit that the statute, here in question, which if enforced against the plaintiff in error deprives it of its property "without due process of law," which we have shown in the argument in the original Brief, and also in this supplemental Brief, cannot be enforced against the plaintiff in error, notwithstanding this Court should hold, that it *impliedly agreed* to be bound by and abide by it, when it began business in the State of Maryland, as *contended* by the defendant in error.

One constitutional right cannot have a higher or better right to protection than another, and certainly this Court will not hold, that a right to a trial by a jury in a Federal Court, in the same State perhaps as the State Court jury, had for the purpose of protecting a property right, is more *worthy* of *protection*, than the constitutional right of not having one's property taken without compensation, and without *any trial at all;* but by a *statutory judgment* rendered and practically *entered* before the trial begins, as is the case with the statute, here in question, if enforceable, as applied to the plaintiff in error in the case at bar.

Nor do the cases, cited by the defendant in error, in any way alter the above conclusions, or support its contention.

Hammond Packing Co. vs. Arkansas, 212 U. S. 322, and Insurance Co. vs. Prewitt, 202 U. S. 246, affirm the decisions in the cases cited, *supra*, that an *unconstitutional statute cannot be enforced*, but hold that compliance with an unconstitutional statute may be made a condition for the retention of a license to do business in a State.

In short, the cases cited by the plaintiff in error decide that an *unconstitutional statute* cannot be enforced, even though a *foreign corporation expressly agrees* to be bound by it, in obtaining permission to do business in a State.

The cases cited by the defendant in error affirm the above principle, but hold that if the agreement is not kept by the foreign corporation, the license granted, on the making of the agreement, may be revoked. The permission to do business may be revoked, but the unconstitutional statute cannot be enforced.

D.

Reverting briefly to the proposition of the defendant in error, that if the statute is *separable*, it does not deny to do-

mestic corporations "the equal protection of the laws," if held applicable to them alone; we see nothing in the authorities of this Court cited by the defendant on pages 17 to 18, that in any manner refutes the plaintiff in error's contention, on the above proposition, or alters the force of the reasoning applicable thereto found in the case of Railroad Co. vs. Ellis, 165 U. S. 150, cited by the plaintiff in error in support of its contention. Individuals are equally in all respects within the *object* of the law with corporations, and there is nothing in the purpose of the law that distinguishes *corporations* from *persons*. The law *is not a tax law as to the custodians; it imposes taxes upon the owners* of the spirits, *in personam*, and does not impose *a tax upon the spirits in rem*, or upon the *custodian*, as the highest Court of Maryland has repeatedly held; but it imposes a *personal duty on the custodian*, and there is nothing in the nature of a corporation to justify the imposition of this duty upon them more than upon *individuals;* it can only "operate *alike on all persons similarly situated*" if it is alike applicable to corporations and individuals.

E.

We make no contention, as the defendant in error seems to intimate on pages 17 and 18 of its Brief, that the State cannot classify property, and value it according to classification, and apply different methods for collection, etc., *provided they infringe no Federal right;* nor do we contend that the property of *non-residents* in a State cannot be valued in the city or county where located; *but we do contend that there is no justification in the Constitution, tax laws or decisions of the highest Court of Maryland for the suggestions* and insinuations made in the defendant in error's Brief from page 17 to 31 and elsewhere, that taxes can be levied *in rem upon any*

property in Maryland, whether owned by non-residents or residents, or that any *taxes can be or ever are levied on* AGENTS *of owners, whether residents or non-residents, or upon custodians* of other persons' property; but, on the contrary, as we have shown in our original Brief, *taxes* are levied on the *owners of things*, and not on *things*, by the express provision of the Constitution of Maryland as construed by its highest Court; and there is no distinction made between *corporations which own and persons who own*.

(1)

At bottom of page 18 of its Brief, the defendant in error, under the heading "Custodian is Assessable in Maryland," states that the entire argument of the plaintiff in error is based upon the false premises, to wit: *First*, "that under the Maryland law property located in the State cannot be *assessed to the custodian*, as distinguished from the *owner*, whether *resident* or *non-resident*;" and *Second*, "that no tax can be imposed upon *anyone* other than the *owner* of property."

In refutation of the above propositions the defendant in error starts out by saying:

> "The plaintiff in error concedes that its entire case depends upon the correctness of these premises."

Although the plaintiff in error could safely rest its case on the above propositions, it has already shown *supra*, that since the statute imposes a *personal* duty or obligation upon the plaintiff in error, a *non-resident*, it cannot be enforced against the plaintiff in error, whether considered as *taxing it*, or the *spirits*, or the *resident* or *non-resident* OWNERS of the *spirits*; or *considered* as constituting the plaintiff in error a collector or agent for the State, and commanding it to pay the taxes imposed upon other *persons*, and on *them* alone.

But even assuming that the plaintiff in error's case rests upon the propositions above stated by the defendant in error, there is nothing in the latter's Brief that shows them to be *unsound*, or *"false,"* or *"erroneous."*

On page 20 of its Brief the defendant in error says:

> "It is true that under the Maryland law taxes are *imposed* upon *persons*, and *not* upon *things*, the *things* being merely the *measure* or *basis* of the *assessment against the person.*"

It is then stated:

> "That by referring to the statute, here in question, that an *assessment* against the *distiller* or *custodian* was *intended* by the Legislature *irrespective* of the fact of *actual ownership.*"

And on page 21:

> "That in each of the three Maryland cases (there cited, construing this statute), the *assessment* complained of had been made *against* the *custodian*, and not against the *owners*, and that this *assessment* had been upheld by the Court of Appeals in the said cases."

And then at the bottom of page 22 the defendant in error says:

> "It must be remembered that the law was being assailed, because, literally interpreted, it imposed a tax *in rem* upon the *spirits*, and it was to meet this specific objection that the language, so much relied on by the plaintiff in error, was used. At the same time the Court upheld the right to *assess and tax the custodian who was not the owner.*"

All of the above statements of the defendant in error are shown to be *unsound* and to be *in the teeth* of the Maryland

decisions referred to by it. For, both in the Monticello Case and in the Carstairs Case, as quoted on page 18 of the plaintiff in error's original Brief, the Court of Appeals did not say, that *persons are taxed, and not things;* but said:

> "Taxes of the kind *here dealt* with are, under Article XV of our Declaration of Rights, levied *not on things,* but on the OWNERS *of things;* and the *value* of the *things* OWNED fixes the measure of the OWNER'S *liability* to contribute in taxes towards the support of the government. * * * And we hold therefore that *the tax* is upon the *owners of the spirits, and not upon the spirits.*"

And that by the OWNER above mentioned is not meant the *custodian,* is shown by the Kemp Case, referred to by the defendant in error, quoted on page 20 of the plaintiff in error's Brief:

> "But *the liability* of the appellees (*the custodians*) to pay the *tax due* by the OWNERS of the *distilled* spirits is a *liability* UNLIKE *that* which they are under *to pay taxes* on *spirits* that they OWN. In the one case this *liability* is that of a *collector* for the State; in the other it is that of OWNERS. An *owner* of property *holds it subject* to the *right* of the State to *seize it* upon *summary process* for *non-payment* of *taxes.* As *collector* for the State, the same person is not liable to have his *own property seized* under the same process for the *non-payment of taxes* not ACTUALLY DUE BY HIM AT ALL. This has been expressly ruled in Hull vs. Southern Dev. Co., 89 Md. 8: * * * 'The *sole liability* of the corporation grows out of the *statutory* DUTY TO COLLECT, and not out of its failure to *pay a tax* primarily *due by it.* The corporation *owes* the *money* to the county, *not as* TAXPAYER, *but as tax* COLLECTOR.'"

It is too clear for argument, therefore, that the property is *assessed or valued* to ascertain the OWNER'S *taxable worth*, and that the OWNER *alone is taxed;* and the CUSTODIAN, who is not the *owner, is not taxed;* nor is the property *of another*, in his *custody, assessed* to him, or *valued* to ascertain his *taxable* worth. But he is required to *pay taxes "not due by him at all,"* but which he is commanded to COLLECT.

(2)

In this connection, it is clear also that the defendant in error, on page 24 of its Brief, has not fully digested the Kemp Case, above mentioned; since it contends in the teeth of the above quotation from that case, that the Court held "that the *custodian was in fact taxed;*" and that, "The decision merely distinguished between the *liabilities, under certain local laws,* of the *owners* of property directly *assessed to them,* and those of a *custodian assessed* with property *not belonging* to him, but belonging to *others.*"

The above quotation from the case itself refutes the above contentions of the defendant in error. But in addition to said quotation, the *fact* is, that Fowble, the Treasurer and Collector of Taxes for Baltimore County, treated Kemp, the *custodian,* as the defendant in error would now treat the plaintiff in error; to wit, as a TAXPAYER, *the owner taxed,* and proceeded to *collect the taxes due only by the* OWNERS of the spirits, stored in Kemp's warehouse, under the provisions of *the Public General Laws of Maryland,* codified in secs. 50, 51 and 52 of Art. 81 of the Code of 1904, by *seizing* upon Kemp's private *real property, to sell* the same to *satisfy* the taxes due by the *owners of the spirits alone;* said sec. 52 providing:

> "The real estate of a delinquent *taxpayer may be sold to pay* State, county and city taxes, whether there

be *personal property* or not, the Collector complying with the provisions of the two preceding sections (50 and 51)."

Sec. 47 of Art. 81 of the Code of 1904 providing:

"*All* State, county and municipal taxes shall be liens on the *real estate of the* PARTY *indebted* FROM THE TIME the same *are levied.*"

But, as we have seen, the Court held, that since Kemp was mere *custodian*, and not the *owner of the spirits*, and therefore not a *taxpayer or the person taxed, his property* could not be *seized and sold*, under the above sections of the Code, to *pay taxes "not due by him at all," but only by the owners* of the spirits, who were *taxed*. That Kemp's *liability* was that only of a *collector*, under the statute, and since *no other* remedy was provided for enforcing that *liability, the custodian* must be sued in *assumpsit*, and after judgment was obtained he could execute on Kemp's property, as in the *case* of any other judgment against him; since the taxes *due* by the *owners* in that case were on the *assessed value* of the spirits in the warehouse on January 1st, and were not *due* by the *owners on the assessed value* of spirits, which had come into the warehouse after January 1st, to which latter section 218 of the statute, here in question, applied; and which had been allowed to go out of the warehouse by Kemp without the payment of the tax *due by the owners*, and by which action on Kemp's part his property was liable to be *seized and sold* under the provisions of sec. 219 of the statute here in question.

Therefore, it is clear, that the Court, in the Kemp Case, was defining the *status of a* CUSTODIAN *not taxed* under this statute, here in question, as distinguished from an OWNER *taxed*, with relation to the Public General Law providing for

the *seizure and sale* of the property of an OWNER *taxed,* who was *delinquent in the payment of his taxes due;* and held, that since the *custodian was not taxed* and was not a *taxpayer,* under the statute, the said Public General Law could not be applied to the *custodian.*

Furthermore, no local law was involved in the case. In the Monticello Case, the Court held the statute, here in question, *unconstitutional,* because neither the statute itself nor any local law of *Baltimore City* gave the right of appeal or an opportunity to be heard, to any person interested, as to the *valuation* of the spirits by the State Tax Commissioner; but since the Public General Law applied to *all counties* in the State, and gave a right of appeal and an opportunity to be heard as to *valuation,* this objection could not be sustained in the Kemp Case, since it arose in Baltimore County.

(3)

On bottom of page 23 of its Brief the defendant in error, after quoting sec. 51 of Article 3 of the Constitution of Maryland, states: "There is here explicit recognition of the *right to tax* goods and chattels *in rem.*" But although that section of the Constitution, like the statute, here in question, if read literally, would seem to provide for the taxing of goods and chattels *in rem,* the highest Court of Maryland has construed it, as *it has the statute,* "in connection with the *settled* policy of Maryland as announced in the Declaration of Rights," and has held that as to goods and chattels *permanently located* in a city or county of the State, the OWNER *is taxed, and not* the goods and chattels, although the goods and chattels are *valued* or assessed in the city or county where *permanently located,* and the OWNER *is taxed* at the RATE in force in the city or county where the goods and chattels are *permanently located,* although a less *rate* might be in force in

the city or county of his *residence*, at which *latter rate he is taxed* on the valuation of goods and chattels *not permanently located* elsewhere in the State.

That we have correctly stated the Court of Appeals' construction of the above section of the Constitution of the State is shown by its decision in the case of Hopkins vs. Baker, 78 Md. 363.

In this case a firm or partnership, composed of three partners, one of whom resided in Baltimore City, and two of whom resided in Baltimore County, carried on business in Baltimore City, having a stock in trade *valued or assessed* at $80,000; and on this *valuation the firm was taxed in personam* at the Baltimore City *rate*, which was about $2.00 on the $100.00 in Baltimore City, while the Baltimore County *rate* was about 65 cents on the $100.00. The partners contended that only the member of the firm who resided in Baltimore City could be *taxed* at the Baltimore City *rate* on the *valuation* of his interest in the stock in trade, and that the other *two members* should be *taxed* at the Baltimore County *rate on the valuation* of their respective *interests* in the stock in trade, since the stock was *always changing*, and was not *permanently located* in Baltimore City, but followed the owner to his place of residence. But the Court held that the stock in trade was *permanently located* in Baltimore City; and, being partnership property, was the joint property of the firm, and that therefore, under the above section of the Constitution in connection with the Declaration of Rights, the members of the firm were properly *taxed jointly* as a firm, on the *valuation* of $80,000, at the Baltimore City *rate*. The Court stated in its opinion, on page 369 of 78 Md.:

> "It is admitted that the place of business of the firm is on Charles street, in Baltimore City, at which place is kept the stock of the partnership, of an average *value* of $80,000; that the *firm has been assessed* by the Ap-

peal Tax Court of Baltimore City for $80,000 on their stock, and $750 on their horses used in their business, and *taxed* $1,393.95 for State and city taxes for 1892."

It is clear from the above case that the property of the *partners was valued* to ascertain their joint *taxable worth*, and that the *partners were taxed jointly in personam*, as joint *owners*, and the only effect of the above section of the Constitution was to provide for the imposition of *taxes on all the partners in personam* at the Baltimore City *rate*, instead of on *one* of the partners at the city *rate*, and on the other *two* at the Baltimore County *rate*.

(4)

Nor does the case of Bonaparte vs. State, 63 Md. 465, decide that property can be *taxed in rem* in Maryland; nor that a *person* other than the one having the legal title can be *taxed*. In that case Bonaparte's testatrix, a resident of Baltimore City, died owing *taxes* that had been imposed upon her *personally* before her death, and the Court held that these were payable by the executor *out of the estate of the testatrix as preferred debts*, by the express provision of the Code of Maryland. *Taxes* were also imposed upon the executor as such on the *valuation* of the property of the estate, after the death of the testatrix. Bonaparte contended that since he was a resident of Baltimore County, he should be *taxed at the rate* there, and not in Baltimore City at the city rate. The Court held, that the property was *permanently located* in Baltimore City, and that since he, as executor, held the legal title to the property, *he was properly taxed* in Baltimore City at the city rate.

There is certainly no departure from the "settled policy of Maryland" in the above case.

(5)

So in the case referred to by the defendant in error on page 24 of its Brief as a "later case," being the case of Baldwin vs. Washington County, where the Court held, that although the *individual* Baldwin might be a resident of another county or another State, yet the *guardian* Baldwin was a resident of Washington County, where he was appointed, and was *personally taxed* and liable for the *taxes* levied on him, on the *valuation* of the property to which he had the legal title; and although he contended he had turned the property over to his *ward*, and therefore no longer had title to it, the Court held, that he could only *legally* transfer it through the Orphans' Court of Washington County; and since the records of that Court did not show a transfer, the title to the property was still in him, and *he* was lawfully *taxed on the valuation* of the property.

Here again there is not a *tax in rem* on property, but on the *resident owner* of the property.

F.

Again, when the defendant in error, at bottom of page 25, etc., of its Brief, speaks of the distiller being made the *agent* of the *owner* by the statute, it states something contrary to the decisions of the highest Court of Maryland, which have uniformly decided that the distiller is the *agent of the State to collect taxes from the owners*, but even granting for the sake of argument that the distiller is the *agent of the owners*, since the distiller is *not taxed* by the statute, and since the spirits are *not taxed*, and since the *non-resident owners*, in this case, are not reached by the statute, by force of the Fourteenth Amendment of the Federal Constitution, how can the fact that there is an agent of the *non-resident* owners in the State help the statute to reach the *non-resident owner*,

and impose the *personal obligation*, since the *tax levied* by the State, the Court of Appeals says, is levied, if at all, upon the *owners in personam*, and not on the spirits of the *custodian;* and the mere fact that the distiller is required by the State to return the spirits for *valuation*, and that he is allowed to appeal does not make him the *agent of the owner*, since the *owner* has the same right, and the distiller sometimes is the *owner*.

G.

No case can be found to sustain the contention of the defendant in error, that where a statute imposes a tax *in personam, and the person is a non-resident*, and does not also impose a *tax in rem*, that the State can nevertheless collect its attempted levy from the *non-resident's* property in the State. The cases cited on page 27 of its Brief do not sustain the proposition, nor does the case of Bristol vs. Washington County, 177 U. S. 133, cited on page 28, which is a clear case of a *tax in rem;* as also are the cases cited on page 29.

H.

On page 29 of its Brief the defendant in error contends that the reasons urged by the plaintiff in error against the validity of the tax as to *non-resident individuals* do not apapply to *foreign corporations*, but we have seen, *supra*, that this position cannot be sustained; furthermore, mere owning of property in a State is not doing business in a State.

I.

The defendant in error states on page 30 that the plaintiff in error's second plea says that "The *owners* of the distilled spirits always have been *non-residents*," without stating that the *owners were individual owners*, and, therefore, it says,

this Court must hold that they are *foreign corporations*, and, therefore, although *non-residents*, the statute can reach them, and the obligation has been imposed. Without stating again the fallacy of this *foreign corporation and resident agent* theory, it will be seen that the words of the plea are "*said owners*," they already having been referred to as "*persons* other than this defendant." And since the primary meaning of *a person is an individual*, the objection to the plea is without merit, even if *foreign corporations, non-resident*, and not doing business in the State were on a different footing as to this statute which levies taxes *in personam*.

J.

We do not deem it necessary to notice the suggestion of the defendant in error on pages 28 and 29 of its Brief, that this Court should put a construction on the tax Article of the Constitution of Maryland, and this statute, in *direct conflict* with the decisions of its highest Court; the latter having held that the *tax is in personam on the owner, not in rem on the spirits, and not on the custodian*; it is now suggested that this Court construe the Constitution of the State and the statute, so that the State Courts' construction prevail where the *owners are residents*, but if *non-residents*, then, that the *tax is in rem on the spirits*, and on the *custodian*; and this in order that the plaintiff in error, who pays promptly all taxes *attempted* to be levied upon it on the valuation of its property in Maryland, may be compelled to pay in addition taxes due by others, *if at all*, and "not actually due by it at all."

All of which is respectfully submitted.

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